The Canadian Charter of Rights and Freedoms, 1981

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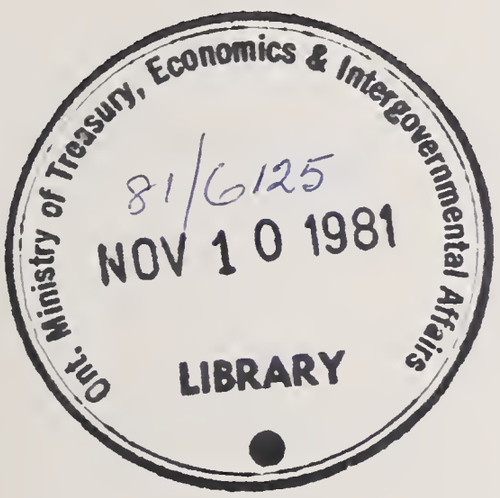
by Donald Smiley



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Donald Smiley
Toronto, July 10, 1981

PREFACE

This Discussion Paper was written in June and early July 1981. When I began it, I assumed that before its completion the Supreme Court of Canada would have rendered its verdict about the constitutional resolution and that perhaps the Parliaments of Canada and the United Kingdom would have acted on the resolution to bring about important changes in the Canadian Constitution. The Supreme Court has not yet given its decision. Although there was no rational basis for my projections of how things would happen, I can say in mild defence that my expectations coincided with those of the Government of Canada.

The assumption of this paper is that the Charter of Rights and Freedoms will become part of the Constitution of Canada in the next year. From a stylistic viewpoint it would have been both very tedious and perhaps beyond my grammatical wits to write the analysis entirely in the subjunctive mood, and I have tried to avoid this whenever possible. If, on the other hand, either the Supreme Court of Canada or the Parliament of the United Kingdom prevent the Charter from coming into effect, this paper may contribute something to future debate on the entrenchment of human rights as it is inconceivable that the issue will be removed from the Canadian constitutional agenda.

My impulse to write this analysis was based on the assessment that the public debate on an entrenched Charter of Human Rights, which began in 1968, has not been very satisfactory so far. There have been two major elements in this debate. The first has been the ongoing argument of a somewhat general nature between those who espouse the conflicting principles of constitutional entrenchment and of parliamentary supremacy within the framework of a federal division of legislative powers. More recently, there have come into the debate those whose primary interests are in particular kinds of human rights. No one, so far as I know, has

examined the Charter from a point of view that could reasonably be called comprehensive, and this paper is an attempt in this direction. The key to the analysis is the long last chapter, where I attempt, in an inevitably speculative way, to examine the possible consequence of the Charter for the protection of human rights, for the position of the courts in the Canadian system of government, and for the Canadian political culture. The chapters on specific aspects of the Charter - mobility rights, linguistic rights, and egalitarian rights, along with some discussion of emergency powers - are in a sense illustrative of my more general argument.

I wish to make two personal caveats. The first is that I am not a lawyer, but rather a citizen who has participated to some degree in the defence of human rights and a political scientist who has had as his primary concern the working of Canadian institutions of government, including the courts of law. I have thus tried to avoid judgements that are the exclusive province of the legal scholar - for example, the complex matter of the possible impact of the Charter on the rights of the native peoples, the difference in Canadian jurisprudence between 'natural justice' and 'the principles of fundamental justice', and Canada's international legal human rights obligations and the implications of the Charter for these obligations. My second caveat is that I am on public record as opposing the constitutional entrenchment of rights, for reasons of principle and efficacy, and the procedure by which the government of Canada has attempted to effect constitutional change since the introduction of its constitutional resolution into Parliament in early October 1980. However, it would be both futile and mean-spirited to write this paper as a rearguard action against the Charter and the way it is becoming part of our constitution, and I hope my argument will be accepted on these terms.

Chapter I

A PRELIMINARY LOOK AT THE NATURE OF HUMAN RIGHTS AND THEIR PROTECTION

A right is a claim made against the state authorities of a political community for some specified kind of treatment to be accorded to individuals or groups. In this sense we limit rights to claims that other persons are capable of fulfilling. For example, if we heard that a child had died of leukemia, we might say that this young person had had the 'right' to a longer life, but we are not using 'right' in the way I have defined it above, assuming that the child had been given the best medical care available; rather we are protesting the ways of God or of a cruel and seemingly unjust universe. Similarly, we would not ordinarily speak of the 'right' of skiers to adequate winter snowfall, although we might well come to do so in the future when we learn to control the weather. Rights as I have defined them are only a subset of the claims that may be fulfilled by human actions - those claims that it believed possible and appropriate for the state to protect. For example, human beings require love, the respect of others, and friendship, but we do not ordinarily speak of these as human rights because it seems impossible for the state to ensure these claims are met, although certainly there are measures under the powers of the political community that make it more or less likely that these benefits will be widely shared. Of course, the prevailing views about the desirable and efficacious range of state action are subject to change.

Five more specific points can be made about human rights and their protection. They may appear to be trite, even self-evident, but in the context of the very superficial debate about rights that Canadians have recently undertaken it seems necessary to state such seeming banalities.

First, unless stated at a very high level of generality, rights are not absolute and at some point every right is subject to limitations under some actual or conceivable circumstances. There are absolute statements about

rights, such as Immanuel Kant's categorical imperative that persons are to be treated always as ends and never as means and Sir Ernest Barker's dictum that the purpose of the state is to promote 'the highest possible development of all the capacities of personality in all of its members'. Yet such statements do not provide us with much concrete guidance in the specification and ranking of human rights, certainly not in a society, like Canada's, with a general commitment to liberal and humane values. Even apart from the current controversies about abortion and capital punishment, we qualify such a claim as the right to life; demonstrably, lives could be saved by building safer highways and making available more dialysis machines, and there is even a minor specialty of cost-benefit analysis that attempts to set monetary values on human lives so that policy makers can come to more 'rational' trade-offs or at least make such trade-offs with a more deliberate appreciation of the 'costs' of alternatives. Similarly, in an international context the right not to be tortured is often advanced as an absolute, although one could even imagine situations where torture would be justified - say to fend off imminent nuclear terrorism. Most of the rights included in the Canadian Charter of Rights and Freedoms are subject to even more obvious limitations in circumstances where they conflict with other values recognized as legitimate. Unfortunately, the Charter itself contributes to the false notion of the absoluteness of rights by including the phrase 'Guarantee of Rights and Freedoms' as a heading under which rights are specified.

Second, the particular rights claimed in and recognized by societies change over time; in the contemporary world the rate of change is very rapid. In much of the current debate about rights in Canada, there is little disposition to think in evolutionary terms, and, in this matter as in others, we are very much of a 'now generation'. We think badly of our recent forebears who, for example, believed it was the right of employers to discriminate on the basis of sex, race, and religion as they chose and maintained a federal government apparatus that operated with scant regard to the French language. Even more critically, in entrenching particular rights we proclaim ourselves to be certain enough of our present wisdom to impose it on the future. Those who come after us will be able to undo our handiwork only by resorting to an inflexible procedure of constitutional amendment. For example, the sections of the Charter entrenching the

rights of official-language minorities embody a particular vision of a bilingual Canada. There is a contradictory model, which would divide the country into two unilingual areas with official recognition of the two languages only in the National Capital Region. Yet for such a model to be effected in the future would require national and regional majorities strong enough to secure a constitutional amendment. Prevailing attitudes to rights and their ranking do change, and rapidly, and no doubt those who welcomed Pierre Trudeau's statement of only a dozen or so years ago about keeping the state out of the bedrooms of the nation also welcome more recent legal decisions that make it possible to convict a man of the rape of his wife. New rights are being demanded and recognized in law - the rights of the physically handicapped, aboriginal rights, mobility rights, and so on. New scientific developments, for example in biomedicine, bring new and frightening challenges to human rights, and those who in the future concern themselves with protections against 'cruel and degrading punishment or treatment' are less likely to be protesting the lash and the gallows than the new inventions of psychiatrists in respect to sensory deprivation, frontal lobotomies, and hormone treatments for sex offenders. It must not of course be assumed that the entrenchment of human rights forestalls all future changes short of explicit constitutional amendment. The judiciary will and must play a role in adjusting the general prescriptions of the Charter to changes in circumstances and prevailing values. Yet such evolution will be mainly of a conservative and incremental nature because it is an essential characteristic of the judicial method to rely heavily on past precedent. And of course the more explicitly rights are entrenched, the less is the possibility for adaptation by evolving practices and the ongoing processes of judicial review.

Third, human rights often give rise to disagreements among persons who are committed to liberal and egalitarian values. The more uncritical supporters of entrenchment have spoken as if a right is a right and any decent-minded and disinterested person will be able to recognize when a right is being denied. Yet human rights questions are often ambiguous and involve trade-offs between values that most of us regard as legitimate. Religious freedom is not now regarded as one of the more crucial areas of human rights in Canada, but a host of unresolved choices remain. For example, what about the right of Sikhs to wear their turbans in industrial

situations where the safety officials require hard hats? What controls, if any, should the public authorities impose on the activities of 'cults' that employ sophisticated and allegedly harmful methods of psychological manipulation? Is the official recognition of Sunday, Christmas, and Good Friday an intolerable affront to the rights of non-Christians? Have Jehovah's Witnesses the right to deny their children blood transfusions, even though such actions result in death? What legitimate powers, if any, have the officials of Catholic schools to ensure that teachers have not engaged in overt actions that are contrary to Catholic doctrine? In the Canadian context, human rights controversies do not always or even usually range those who are committed to human rights on one side and those of repressive dispositions on the other.

Fourth, the effective protection of human rights is possible only under a complex set of institutional and attitudinal preconditions. Supporters of the Charter have tended to speak as if the protection of rights is a much less complex matter than in fact it is, and even if Canadian courts should emerge as aggressive defenders of the rights specified in the Charter, that is no 'guarantee' that these rights will be safeguarded. Certain other preconditions can be enumerated (the following list is far from exhaustive). The protection of rights requires a press that is free (in the senses that it is not subject to prior censorship and that the legal restrictions on which it may publish without incurring civil and criminal penalties are few and clearly defined) and also a press whose leadership is courageous and willing to expend significant resources on expert and aggressive reporting. Protecting rights also requires a great deal of creative institutional experimentation. Federal and provincial human rights commissions have a valuable role, particularly in the protection of egalitarian rights, and there are among these bodies ongoing attempts with respect to the 'mix' of conciliation/good offices procedures, public education, and resort to legal action against those who contravene such rights. We have had recent experience with ombudsmen, some with jurisdiction-wide duties in the provinces and others (like the federal commissioner of official languages and the commissioner of privacy) with specialized functions. Members of Parliament and of provincial and municipal legislative bodies need to be vigilant defenders of rights and to equip themselves with the staff resources to play this role effectively. We need more and more effective private organizations whose work is wholly or

exclusively the defence of human rights and these bodies must maintain their financial independence of government. Above all, there is the pre-condition that those whose rights are being encroached upon be aggressive, sophisticated in the defence of these rights, and able to count on tangible support from others and on an underlying resonance in the mass public to their claims.

Fifth and lastly, among defenders of human rights there is no agreement about the distinction between rights that are fundamental and thus a moral imperative for all societies and rights that defensibly reflect the circumstances and traditions of particular jurisdictions. If one defines the fundamental category very broadly, one posits conditions incompatible with the territorially based differences within particular federal nations, let alone the much more profound differences among sovereign states. For example, in his book on American federalism Michael D. Reagan (1972, 156) advances a somewhat idiosyncratic interpretation of the 'equality before the law' guarantee of the Fourteenth Amendment to the effect that this 'by analogy' means 'equality of social services regardless of geographic location within the country'. Such a formulation appears incompatible with the territorial particularisms of federalism. In the Canadian context, the federal government rejected what came to be called the 'Vancouver formula' for constitutional amendment, which would have allowed some provinces to opt out of certain amendments desired by others. The rationale for Ottawa's position was that such a regime would result in an indefensible 'checkerboarding' of human rights. Yet both the existing circumstances and those that the Charter envisages involve considerable provincial diversity in human rights. In Newfoundland, for example, all publicly funded elementary and secondary education is carried on under the auspices of religious denominations, whereas in British Columbia the public system is wholly secular. The Quebec Human Rights Code prohibits discrimination on the basis of sexual orientation; counterpart legislation in the other provinces does not. Of course the civil code of Quebec and the English common law of the other provinces contain different traditions of rights. Thus any Canadian regime of human rights that prevents 'checkerboarding' would stifle both the territorial diversities that make federalism necessary and the dispositions of some provinces to be more liberal or egalitarian than others in the protection of human rights.

The protection of human rights is a field of public policy, although it

is all too seldom recognized as such. As in other areas of policy, protecting human rights requires ongoing compromises among legitimate objectives. The public policy of rights is, however, even more complicated than the others because persons and groups press their claims in an absolutist fashion with the assertion that qualifications of such rights are a denial of the first-order values of the community.

Chapter II

THE BACKGROUND OF THE CHARTER

No public measure can be understood without some knowledge of its origins. The chapter will, in a brief and fragmentary way, attempt to trace the roots of the Canadian Charter of Rights and Freedoms.

The British North America Act of 1867 provided for a very limited constitutional entrenchment of rights:

- Section 133 conferred equality on the French and English languages in the proceedings and records of the Parliament of Canada and the legislature of Quebec and in the courts established by these bodies. These linguistic provisions were carried over from an amendment to the Act of Union enacted by the Parliament of the United Kingdom in 1848 at the request of the government of the United Province of Canada.

- Section 93(2) entrenched the educational rights of Protestant and Roman Catholic minorities in the provinces as such rights existed at the time of union or were subsequently established. If the rights of a minority were abrogated, there was an appeal to the Governor in Council, and, if a recalcitrant province refused to accede to the demands of the federal cabinet, the situation might be righted by Parliament enacting remedial legislation.

Sections 133 and 93(2) reflected the demands of linguistic and religious duality at the time of Confederation. Apart from these provisions, the powerful English-Canadian group in the new province of Quebec (which was created by the BNA Act) received protection for what was about to become their minority status. The boundaries of certain provincial constituencies where the English-Canadians were concentrated were protected through the appointed Legislative Council of the province and through the division of the province into districts for the purpose of appointing members of the Senate of Canada. The BNA Act also made provision for

the Parliament of Canada to be constituted and operated in accord with the general principles of British parliamentary government and thus gave constitutional protection to certain of what the Charter calls 'democratic rights' - for example, in the provisions of Section 20 that there should be annual sessions of Parliament and of Section 53 and 54 that all motions for the raising or expenditure of public funds should be introduced into the House of Commons by the Governor General, in effect by a cabinet minister.

Human rights were not given any other explicit protection in the British North America Act. The rights of citizens and groups of citizens were those embedded in the common law (and the Civil Code of Quebec), as interpreted by an independent judiciary, and supplemented, extended, or limited by the Parliament of Canada and the legislatures of the provinces acting within their respective spheres of legislative jurisdiction.

In combining British parliamentary forms with federalism, the Confederation settlement gave the judiciary a relatively restricted role in the definition and protection of human rights. To put it another way, judicial review of the Constitution is almost exclusively concerned with delineating the respective legislative powers of the federal and provincial governments. In this activity the courts have on occasion moved to protect human rights. For example, the judiciary has invalidated a very large number of provincial laws abrogating human rights on the grounds that they encroached on federal legislative jursidiction over such matters as Indians, criminal law, naturalization, and so on.[1] Yet for the most part the Canadian constitutional regime does not assign human rights as such any independent constitutional value.

In Reference re Alberta Statutes, decided in 1938,[2] the Supreme Court of Canada attempted to break out of the division-of-powers approach to human rights questions in striking down an Alberta statute that encroached on freedom of the press. While the decision given by most of the justices was that the offending act was part of a general scheme of Social Credit legislation that encroached on federal powers, the chief justice (with some support from one other judge) advanced the doctrine, wholly novel in Canadian jurisprudence, that the preamble of the British North

1 For a detailed account of judicial activity in human rights in Canada see Tarnopolsky (1975).

2 Re Alberta Statutes [1938], S.C.R. 100.

America Act (which stated in part that Canada was to have a 'Constitution similar in Principle to that of the United Kingdom') meant that the Act contained what some commentators later called 'an implied bill of rights'. The general argument here was that parliamentary institutions required rights of free expression and that abrogations of such rights were thus beyond the powers of the provinces. There was some reliance on this doctrine by the Supreme Court of Canada in the 1950s but more recently it has been put in abeyance by the judiciary. If the implied-bill-of-rights doctrine had been pressed aggressively by the courts, it would not only have entrenched human rights in the Constitution but given the judges almost unfettered discretion in determining what rights received such protection.

Apart from the Reference re Alberta Statutes and despite the standing example of the U.S. Bill of Rights before them, Canadians prior to the Second World War were little disposed to debate the matter of the further entrenchment of rights, although in the document Social Planning for Canada the League for Social Reconstruction (1935, 508) made such a recommendation without examining its implications. The war brought a renewed interest in both civil liberties and their protection in the Canadian Constitution (Tarnopolsky 1975, 3-7). The Axis powers had been repressive regimes and at the end of the conflict there was an almost worldwide consensus that such regimes menaced not only the rights of their own citizens but international peace and order as well. Thus from its beginnings the United Nations showed a much more profound concern with the international protection of rights than had the League of Nations; the U.N. Declaration of Human Rights was promulgated in 1947. In the decade or so after 1945 several scholars, such as Frank Scott, argued that an entrenched bill of rights was necessary if Canada were to discharge its international obligations.

In 1960 Parliament enacted the Canadian Bill of Rights. Prime Minister John Diefenbaker, whose child the measure was, would have preferred an entrenched bill but apparently believed that the necessary provincial support for a constitutional amendment to this effect was unattainable. Thus the Diefenbaker Bill of Rights gave protection to rights within the field of federal jurisdiction alone and explicitly provided that Parliament might enact legislation 'notwithstanding' provisions of the bill.

In giving meaning and effect to the bill the courts had two alternatives. One was to regard its terms as no more than interpretive principles that should not override federal law or executive acts clearly contrary to its provisions. The other option was to interpret the Bill as a constitutional statute and to nullify actions of the federal authorities deemed incompatible with it. During the 1960s the Supreme Court of Canada was disposed to the first alternative. However, in the Drybones case of 1970[3] the Court declared invalid a section of the Indian Act that explictly provided for discrimination against Indians of the Northwest Territories and thus established the principle that the Bill of Rights was a constitutional statute by which other federal laws and executive acts were to be measured and, if found wanting, invalidated. Despite the principle enunciated in Drybones, the Court has not been assertive in challenging federal law or executive actions by reference to the Bill of Rights, although in several of these cases a minority of justices have adapted a more activist stance.

The immediate origins of the 1981 Canadian Charter of Rights and Freedoms are in the proposals the Pearson government put before the provinces in the Constitutional Conference of February 1968.[4] There has been a remarkable consistency in the constitutional priorities of successive federal Liberal governments from that time to the present, and it is impossible to escape the conclusion that these have been very much those of Pierre Elliott Trudeau.

The convening of the 1968 Conference was the federal response to the calling of the November 1967 Confederation for Tomorrow Conference of the provincial governments by Premier John Robarts of Ontario. This latter initiative was taken in a period when Quebec was imposing severe strains on Confederation and when Quebec-Ottawa relations were particularly hostile. Although linguistic rights was one of the topics on the November agenda, it became quite clear that the priority of the provinces (so far as they were at all favourably disposed towards constitutional change) was in

3 Regina v. Drybones [1970], S.C.R. 282.

4 The two major documents here were Federalism for the Future under Prime Minister Pearson's signature (1968) and A Canadian Charter of Human Rights under that of the then Minister of Justice Pierre Elliott Trudeau (1968). For a more explicitly philosophical rationale of Ottawa's strategy see The Constitution and the People of Canada (Trudeau 1969).

some new sharing of legislative powers and fiscal resources with the federal government. It might be noted that this kind of provincial preoccupation has continued, and that although some provinces have on some occasions supported an entrenched charter of rights, none seems ever to have regarded this as the first priority in constitutional reform.

The federal constitutional strategy, as first announced in early 1968 and subsequently followed in its essential elements, was an attempt to forestall the almost exclusive interest of the provinces in the federal-provincial dimension of constitutional review and reform. The document Pearson (1968, 6-10) introduced at the beginning of the conference, called Federalism for the Future, contained the proposal that constitutional review should proceed in three successive phases. First, there should be a discussion of the entrenchment of human rights, including linguistic rights along the lines recently proposed by the Royal Commission on Bilingualism and Biculturalism. Then the governments would turn their attention to certain institutions of the central government - the Parliament, the National Capital, the Supreme Court of Canada, the federal public service - so that these might better reflect a 'balanced representation' of the cultural and other diversities of Canada. At the end, there would be a review of the federal-provincial division of powers. This order was of course quite deliberately conceived. In Federalism for the Future there was much emphasis on the argument that the new constitutional order should be based on fundamental and clearly articulated principles and the principle to which the federal government was committed was expressed in these terms: 'we have proclaimed our belief that the rights of people must precede the rights of government' (Pearson 1968, 8). It is also reasonable to suppose that Ottawa believed that if Canadians came to feel more secure in their rights by way of an entrenched charter and changes in the institutions of the central government they would be less disposed than otherwise to support a wider scope of provincial powers.

Also at the same conference, Mr. Trudeau, then minister of justice, introduced the document A Canadian Charter of Human Rights (1968). In its classification of rights as political, legal, linguistic, egalitarian, and economic this document followed the categorizations made by the then Professor Bora Laskin (1959). This schema has attained a semi-official status in Canada and is embodied in the 1981 Charter.

The federal constitutional strategy, adopted in 1968 and subsequently

followed, was based on an articulated and reasonably coherent view of Canada and its political system. This general framework has been perceptively examined by Alan Cairns (1979) and more detailed attention will be given to it in the last pages of my paper. In brief, there is here a disposition to change the Canadian political system and political culture in a fairly fundamental way by inducing Canadians to identify themselves and to frame their allegiances in terms of their rights as protected by national institutions; thus the provincialization that has become so pervasive will, it is hoped, be weakened.

In accord with federal plans, much of the discussion at the February 1968 conference dealt with the entrenchment of rights. From that time onwards the discussions became much more diffuse. Some if not most of the provinces had little or no interest in constitutional reform, and to retain even their nominal participation in the review process Ottawa was forced to put on the agenda a number of fiscal and other provincial concerns, even though some of these had only tangential relevance to constitutional change. The process became more focused in the early months of 1971 and the Victoria Charter did contain provisions for entrenchment.

After the refusal of the government of Quebec to accept the Victoria Charter the process of constitutional review lapsed. In late 1974 the federal government attempted to revive this process by suggesting to the provinces that other aspects of the Constitution be put aside in favour of a concerted attempt to come to agreement on patriation and a domestic procedure for amending the Constitution. The provinces quickly demonstrated their unwillingness to discuss patriation/amendment outside the context of a review of the distribution of powers; again the matter lapsed.

After the election of the Parti Québécois government in November 1976 there was more widespread and vigorous debate about constitutional matters than ever before in Canadian history. The somewhat delayed response to this new situation was the publication in June 1978 of a draft federal bill entitled the Constitutional Amendment Bill and popularly called Bill C-60. Again no agreement could be reached with the provinces.

During the campaign preceding the Quebec referendum of May 1980, the government of Canada and the leaders of several of the other provinces gave the Quebec electorate the commitment that if there were a NO verdict returned there would be an early and vigorous attempt at fundamental constitutional reform in the direction of what has come to be called

'renewed federalism'. This pledge was honoured by very intensive meetings during the summer of 1980 among the ministers of the eleven governments responsible for constitutional matters, and this process culminated in the First Ministers' Conference in September, at which no agreement on any of the fundamental issues of constitutional reform was reached.

Subsequent to the breakdown of the September meeting, the federal government in early October introduced a draft resolution for constitutional reform into Parliament. The resolution was to be a Joint Address of the Senate and House of Commons requesting the United Kingdom Parliament to take its final action in respect to the Canadian Constitution. The resolution provided for patriation of the Constitution, a procedure by which a domestic amending formula would come into operation within two years, a charter of rights and freedoms and a clause that in effect committed the federal authorities to interprovincial equalization and policies to narrow regional economic disparities.

All the informed commentators who examined the Charter as embodied in the October resolution agreed that it was inadequate. In particular, there was almost unanimous objection to Section 1, which stated: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.' The critics claimed that this broad and amorphous definition of 'reasonable limits' was almost a standing invitation to the courts to uphold legislation and executive acts infringing on the specified rights and to find in the language of the Charter, as they had found in the Diefenbaker Bill of Rights, a rationale for unaggressiveness in safeguarding rights. There were many other examples of loose wording and what critics believed to be indefensible omissions.

The Charter as contained in the resolution embodied compromises that had been bargained out with the provinces in the constitutional negotiations of the summer of 1980. Several of the provincial governments, particularly those of the West, were in principle opposed to constitutional entrenchment and it is reasonable to speculate that the wording of Section 1 was a partial response to these objections.

The resolution was debated in Parliament, and in early November it was submitted to the Special Joint Committee of the Senate and House of

Commons, which held prolonged, televised, public hearings. The committee reported in early February. Those hearings completely altered the political context of the Charter. Constitutional discussion was moved from the relative confidentiality of intergovernmental negotiation to the public arena. Even more crucially, in this arena there was little outlet for those who were in principle opposed to entrenchment. The two opposition parties in Parliament were both committed to an entrenched Charter; the Progressive Conservative position on the joint committee was a difficult one as the government members were able to forestall much-prolonged debate about the Conservatives' objection that the procedure by which constitutional reform was being effected was inappropriate; the Liberals also went on to claim that if the Opposition was sincere in wanting a Charter it was clearly illogical in opposing the only available means of getting one. All but a very few of the individuals and groups who appeared before the committee were in favour of entrenchment in principle and made specific suggestions for improving the Charter.

The revised Charter as returned to Parliament by the committee on February 13, 1981 was in every sense an improvement on the original version. A new Section 1 read: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' There was an explicit recognition of the aboriginal and treaty rights of the native peoples. Section 24(1) gave the courts wide authority to give remedies to those whose Charter rights had been infringed or denied. Many other changes in wording and substance were made at the suggestion of opposition and government members of the committee and of the witnesses who appeared before it. It is hard to escape the suspicion that the government acted in a somewhat machiavellian way in all this. The obvious defects of the original version of the Charter shifted attention to this aspect of the constitutional debate and away from a discussion on the procedure by which constitutional reform was being effected. In its willingness to accept extensive revisions the government demonstrated what it wished to be seen as its openness and flexibility.

Over the past generation, predominant Canadian opinion, both lay and expert, has moved to accept the desirability of more extensive constitutional entrenchment of human rights. Yet there is no consensus about the matter and in legal and academic circles there is a continuing strain of

anti-entrenchment argument. The most sophisticated version of this argument is contained in the Report of the Ontario Royal Commission of Inquiry into Civil Rights (Ontario 1969, report 2, vol. 4, chap. 107) in which the commissioner, the Honourable J.C. McRuer, asserted that on the grounds both of democratic theory and of institutional efficacy legislatures were to be preferred over courts in the definition and ranking of human rights. As we have seen, there is a continuing opposition to entrenchment among some of the provincial governments. While in part this is a reflection of the conservative legal philosophy of Premiers Allan Blakeney and Sterling Lyon, this western opposition appears also to be a reflection of the unhappiness of the governments of the region with recent Supreme Court decisions related to natural resources and a consequent hostility to extending the role of the judiciary, as is inherent in a Charter of Human Rights.

The bringing into effect of the Charter would of course be a decisive defeat for the anti-entrenchment forces in Canada. Yet it might well continue to be a matter of some consequence that a significant proportion of the informed and influential public had these views. It is my impression, but certainly only an impression, that many of the more senior and respected members of the Canadian bar and bench believe as a matter of fundamental conviction that legislatures rather than courts should define and rank human rights. This continuing conviction may well have an important effect on how the Charter is regarded by that element of the informed public most closely involved with it, and how the Charter is given meaning and effect by the courts. Further, there is a considerable body of informed opinion that the procedure by which constitutional change is being effected is inappropriate in terms of what are regarded as the well-established conventions of the Constitution. In short, the Charter may well face a legitimacy problem in at least the short-term future.

Chapter III

EGALITARIAN RIGHTS

Aristotle in The Politics asserted that justice consists of treating equals equally and unequals unequally. This imperative is purely formal and not very helpful until we devise tests of what differences among people are relevant or otherwise in determining how they are to be treated. Aristotle himself specified several legitimate claims to power and benefits in the polis and criticized both oligarchy, which was based on the assumption that differences in wealth should override all other claims, and democracy, which was based on the dominance of the poorer classes who were more numerous in the state and denied the legitimacy of wealth, birth, and virtue.

In the contemporary context of what the Charter defines as 'egalitarian rights', there is the assumption that the political community in the past has made, and still today makes, indefensible distinctions among individuals and groups and that these practices should be forbidden by law.[1] The Charter specifies seven categories in which discrimination by law is prohibited: (1) race, (2) national or ethnic origin, (3) colour, (4) religion, (5) sex, (6) age, and (7) mental or physical disability. There are other egalitarian claims being advanced in Canada and some of them are embodied in federal and provincial human rights legislation - for example, prohibitions on discrimination in employment because of sexual orientation, marital status, membership in political organizations, and prior criminal records.

The Charter groups, in what seems to me to be a very unfortunate way, two different imperatives:

First, there are distinctions among people that should virtually never be used as legal categories in determining how they should be treated,

1 The Charter is published as an appendix to this paper.

apart perhaps from affirmative action programs to benefit disadvantaged groups. In this category one would place discrimination on the basis of race, national or ethnic origin, colour, and religion. It is possible to conjure up situations in which plausible arguments might be made for the law to distinguish among persons on these axes but it is reasonable to hope that the courts would regard such categorizations as suspect, and impose on the public authorities the onus of demonstrating that such actions were for a valid public purpose.

Second, there are distinctions among people that in some cases provide justifiable grounds for different kinds of treatment under the law, but indefensible kinds of discrimination according to these categories have been and are being made. It is desirable to give constitutional protection against this latter kind of discrimination. This appears to be the general intent of the Charter in respect to age and to physical or mental disability. Federal and provincial law makes a very large number of distinctions on the basis of age, such as the age of marriage, of legal ability to buy and consume liquor and tobacco, the minimum age of employment in certain occupations, the age of compulsory school attendance, legal majority, treatment as a juvenile offender, the age of entitlement to senior citizens' benefits, the minimum age for voting and public office, and compulsory retirement from various kinds of employment and public offices. Despite the absolutist language of the Charter, it is clearly not intended that the law should <u>never</u> make distinctions among persons on the basis of age but only that <u>unreasonable</u> distinctions should be prohibited; in effect the courts are charged with making the final and authoritative distinctions as to what are reasonable.

The same can be said of distinctions based on physical or mental disability. Over the past five years or so we have become vividly aware of the indignities and deprivations we have imposed on handicapped persons. Some of these deprivations have no justifiable basis - for example, we have barred certain kinds of employment to such persons although it can be demonstrated that they can perform such work as well as people without these disabilities. Yet the framers of the Charter surely do not intend that the public authorities should be stopped from making <u>any</u> distinctions on the basis of the physical or mental circumstances of people. Again the Charter appears to impose heavy responsibilities on the courts for framing public policy. What, for example, are the implications of the Charter for

the state imposing conditions on the physical condition of persons holding drivers' or pilots' licences? Is extreme obesity a 'physical disability' or a self-imposed condition in respect to fat firemen or policemen? Would the provincial authorities be exceeding their consitutional powers in denying a licence to operate a day-care centre to a person who was demonstrably mentally retarded? Does 'mental ability' as specified in the Charter refer only to retardation or does it include emotional illness?

Legal distinctions based on sex cannot be definitively assigned to either of the categories that I have outlined, although the prevailing disposition of Canadian law and policy is moving in the direction of making such distinctions suspect and this would seem to be the general intent of the Charter. Perhaps the foremost legal scholar of womens' rights in Canada is Mary Eberts who (in Macdonald and Humphrey 1979, 241) argues that legal distinctions based on sex without a 'biological or physiological rationale' are indefensible. This would of course eliminate distinctions based on the cultural definitions of roles assigned to the two sexes. But Professor Eberts goes on to write: 'Simply to establish that men and women were biologically or physiologically different would not, in my view, be satisfactory. The standard is too open to misunderstanding' and she goes on to criticize certain decisions made by Canadian courts based on such alleged physical differences - decisions to the effect that only women can be prostitutes, that only men can commit seduction, that only a female can be guilty of infanticide and so on (243-4). There are of course other informed persons who would assign a broader scope than this to legal distinctions based on sex.

Section 15(2) of the Charter relates to what has come to be called 'affirmative action': policies undertaken to better the position of groups regarded as disadvantaged. There is here the recognition that formal equality under the law may mean real inequality, that in Aristotle's terms to treat unequals equally is unjust. For example, the admissions policies of Canadian universities do not discriminate against the native peoples in any explicit way but few of them attend these institutions. It has been claimed that the height and weight requirements for policemen are an implicit discrimination against races whose members are physically small. Two generations ago the legal restrictions on women being elected to the House of Commons were removed yet the membership of the House remains overwhelmingly male. Affirmative action may take many forms - for

example, in respect to public employment it might go no further than devoting extra resources to advertising such positions in the publications of disadvantaged groups or, at the other end of the spectrum, specific quotas of positions might be reserved for members of these groups.

Without Section 15(2), Section 15(1) of the Charter would seem to have prohibited policies of affirmative action in respect to the categories of egalitarian rights so specified. In my view, Section 15(2) is loosely worded and because of this may lead to unfortunate results that the framers of the Charter did not intend. To a non-lawyer at least, the phrase 'does not preclude' is ambiguous. Is the intention here to give the courts unrestricted discretion to decide whether individuals and groups are in fact 'disadvantaged' and what steps may justifiably be taken to ameliorate their conditions? Unlike Americans, we Canadians have had little principled public debate on affirmative action and some disadvantaged groups appear to be divided as to whether it should apply to their circumstances - for example, in the women's movement in Canada some are in favour of affirmative action while others like Mary Eberts see progress in minimizing the scope of legal distinctions based on sex. The objectives of Section 15(2) are not entirely congruent with those of Section 15(1), and if the Canadian authorities become vigorous on various kinds of affirmative action programs, and they were sustained by the courts, the general thrust of Section 15(1) - that the specified categories are inherently suspect - would be frustrated.

Section 15(2) appears to authorize, or at least not to preclude, affirmative action in respect to disadvantaged individuals or groups other than those specified in Section 15(1). Why the provision was framed this way is unclear. For example, might not the Newfoundland authorities plausibly claim that in terms of a whole battery of economic dimensions Newfoundlanders are disadvantaged and thus frustrate the application of Section 6 of the Charter relating to mobility rights to that province? Or it might be possible, as someone has said, to demonstrate that graduates of Upper Canada College are in some ways disadvantaged and on this basis for the public authorities to take steps to 'ameliorate' this condition.

The Human Rights Act enacted by Parliament in 1977 is considerably more precise in its provisions:

15(1) It is not a discriminatory practice for a person to adopt or carry

out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, groups of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status, or physical handicap of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

In yet another dimension Section 15 is unclear; it does not specifying the scope of 'equal protection and equal benefit of the law'. The range of public authority is expanding and in flux. What kinds of claims, precisely, may be made under this section? For example, what about discrimination on the basis of national origin made by a cultural association that is probably receiving financial assistance from the public authorities? Is the National Council on the Status of Women required to given equal opportunities to the sexes in filling its staff positions? Are religious organizations prevented from giving preference to members of their own faith in employment, and if some restrictions on their freedom of action are imposed by law, what is the scope of such restrictions?

Since the establishment of the Ontario Human Rights Commission in 1963 egalitarian legislation in Canada has been promoted and enforced by such bodies.[2] By 1975 every province had such a commission and in 1977 the federal Human Rights Commission was created. To me at least, it is not clear how the Charter as interpreted by the courts will impinge on the activities of these agencies; this may well depend on the extent to which disadvantaged individuals and groups, and those acting on their behalf, choose to press their claims through the federal and provincial commission or 'go the judicial route'. The commissions have a range of institutional advantages over the courts in the protection of egalitarian rights - most of them have sweeping investigative powers; they are mandated to engage in a wide range of conciliation and arbitration procedures; they may commission research and in making their decisions take into account any evidence they believe relevant; they may engage in public education; they may establish local offices and take other steps to make themselves accessible to aggrieved persons. Most crucially perhaps, human rights commissions are able to arrive at and enforce complex solutions to complex

2 See Walter S. Tarnopolsky 'The Control of Racial Discrimination,' in Macdonald and Humphrey (1979, 295-307).

human situations.[3] In his testimony before the Special Joint Committee, Mr. Ken Norman, the Chief Commissioner of the Saskatchewan Civil Rights Commission, described 'some of the aspects of a modern human rights agency' in these terms:

> The agency has investigative and educational and prosecutorial staff. It may initiate complaints. It has the carriage of complaints which cannot be settled amicably and which constitute probable clause violations before independent boards of inquiry...we have human rights commissions spread across this country, with original jurisdiction for a simple reason. They are perceived now by all governments as being equipped to do a better job than the ordinary courts in this regard. Not only do they have more equipment and flexibility, as a matter of logistics and politics, but being in the field on a full time basis they can be expected to be somewhat more responsive to the needs of these groups who seek shelter under the protective cover of human rights legislation. (Canada 1980b, 20:13)[4]

Peter Hogg has argued that 'an equality clause is the one most likely to make the courts decide political questions' (Emphasis Hogg's).[5] He went on to suggest that in interpreting the equality clause of the 1960 Bill of Rights the Supreme Court of Canada 'has not succeeded in producing clear or consistent decisions on such issues as the Indian Act (Drybones, Lavell, Canard), juvenile offenders (Burnshine) or pregnancy (Bliss)'. As I have pointed out, Section 15 of the Charter contains imprecise elements and projects the judiciary into crucial areas of public policy, which the courts seem ill equipped to deal with constructively.

3 The federal Commissioner of Human Rights, Gordon Fairweather, in testifying on the Charter before the Special Joint Committee did not deal directly with the implications of this measure for his Commission.

4 Mr. Norman's testimony was one of the few occasions in recent debate where the nuts-and-bolts aspects of protecting human rights were discussed (Canada 1980b, 20: 5-27). One of the cases mentioned involved the employment of female guards in Saskatchewan custodial institutions for males. The solution, and perhaps no court could have arrived at this, was that women guards were barred from those sections of the institution where security considerations required body searches of the inmates but could be employed in other custodial roles.

5 Submission to the Special Joint Committee, December 1, 1980.

Chapter IV

LINGUISTIC RIGHTS AND THE CHARTER

From the late 1960s onwards the more extended constitutional entrenchment of the rights of the English and French languages has been an essential element of the objectives of successive federal Liberal governments for constitutional reform. In his speech to the Quebec Chamber of Commerce on October 22, 1980 Prime Minister Trudeau referred to linguistic rights in terms that suggested that those were the central elements of Ottawa's constitutional strategy and that encapsulating these in a more comprehensive entrenchment of rights made the protection of English and French more palatable to English-speaking Canadians and fended off the charge that constitutional reform was an exercise of 'French power' (page 16). Behind this strategy is a view of Canada that proceeds from the normative premise that there should be a recognition of the English and French languages throughout the country to the maximum degree that this is feasible. A document on the official languages of Canada issued under Mr. Trudeau's signature (Canada 1977, 41) said:

> The federal government rejects the concepts of a Canada divided into two mutually exclusive unilingual separate countries or two mutually exclusive unilingual regions within one country. While these two options have a superficial appearance of dissimilarity, they amount in practice to the same thing, a province or state of Quebec that is unilingual French-speaking, and the rest of Canada, or a truncated Canada, that is unilingual English-speaking. The government rejects these concepts above all because they entail a denial of the existence of the official language minority groups in Canada.

The constitutional entrenchment of language rights is now (prior to the Charter coming into effect) provided for under Section 133 of the BNA Act and Section 23 of the Manitoba Act. Section 133 says:

Either the English or the French language may be used by any person in the Debates of the Houses of the Parliament of Canada and of the House of the Legislature of Quebec; and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any Person or in any Pleading or Process in and issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

Section 23 of the Manitoba Act of 1870 is framed in identical language in its application of the same terms to that province as to Quebec.

In the past decade the Supreme Court of Canada has made three important determinations related to the constitutional position of the English and French languages:

1 In Jones v. A.G.N.B., decided in 1974, the Court upheld the constitutional validity of the federal Official Languages Act of 1969 under Parliament's residuary power to enact laws for the 'Peace, Order, and Good Government of Canada'. Thus Section 133 contained only a minimal imperative and Parliament had plenary powers to enact more extensive safeguards for the two languages.

2 In the Blaikie decision of 1979 the Court declared ultra vires Sections 7-15 of the Charter of the French Language enacted by the Quebec National Assembly in 1977. These sections of what is commonly called Bill 101 would have abrogated the provisions of Section 133 of the BNA Act providing for the equality of the English and French languages in the Legislature and courts of Quebec on the grounds that this was permitted by Section 92(1) of the BNA Act, which authorizes a province to amend its own Constitution 'except as regards the Office of the Lieutenant Governor'. The Supreme Court upheld the primacy of Section 133 in these circumstances.

3 In the Forest case of 1979, the Court upheld the validity of Section 23 of the Manitoba Act. The Manitoba Legislature in the Official Language Act of 1890 had in effect abrogated Section 23 and made English the only official language of the province. The Supreme Court declared the 1890 enactment ultra vires and restored Section 23 to effect.

Apart from public education, the Charter provides four different statuses among the eleven governments in respect to the constitutional entrenchment of the rights of the English and French languages:

- so far as the federal authorities are concerned, the Charter in effect re-affirms the terms of Section 133 and goes on to entrench in general terms the provisions of the Official Languages Act of 1969. The latter conditions are specified in Section 20(1) of the Charter:

> Any member of the public has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or Government of Canada in English and French, and has the same right with respect to any other office of any such institution where:
>
> (a) there is a significant demand for communications with and services from that office in such language; or
> (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

- in New Brunswick there is to be the entrenchment of the rights of the two languages in the legislature and courts similar to the conditions that now prevail in Quebec and Manitoba and in addition the right to deal with the New Brunswick authorities in either language without the qualifications that the Charter enacts in respect to the government of Canada. Section 20(2) reads:

> Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

There is here no mention of 'significant demand' or about it being 'reasonable' that communications with and services of government being available apart from the head or central offices of government institutions.

- in Quebec and Manitoba the existing situation is left unchanged. The Charter confers no further rights than those under Section 133 of the BNA Act and Section 23 of the Manitoba Act so far as the provincial governments are concerned.

- except for New Brunswick, Quebec, and Manitoba the Charter does not require any recognition of the minority official language by the legislatures and government of the province apart from the educational provisions discussed below. If subsequent to the coming into effect of the Charter, any province - say Ontario - wished to give constitutional entrenchment to the two languages so far as its own legislature and government was concerned this decision would be subject to the relatively rigid procedure of constitutional amendment. This would seem to establish an undue inflexibility, which in all likelihood the framers of the Charter have not intended. Article 16 of the Victoria Charter of 1971 provided in effect that a provincial legislature might extend the recognition of the English and French languages in that province beyond the constitutional guarantees that previously existed and under Article 50 such extensions would have become part of the Canadian Constitution subject to amendment by the province to which they applied and the Parliament of Canada. Another device in Section 93(3) of the BNA Act provides that when any province established educational rights for its Protestant or Roman Catholic majority subsequent to union these rights are treated in the same way as such rights that existed at the time of union and, in effect, could be modified or abrogated by resorting to the general amending procedure. In my view, either of these alternatives would be preferable to the provisions of the Charter.

Sections 21(1)(a) and (b) of the Charter may come to impose very difficult responsibilities on the courts in respect to the practices of agencies of the federal government other than headquarters offices. It is by no means clear how judicial decisions on these matters will impinge on the ongoing activities of the Commissioner of Official Languages. What standards of 'significant demand' and 'reasonability' will the courts evolve? If large numbers of persons choose the judicial route in demanding such rights, will the courts require a large number of government agencies to submit detailed plans related to bilingual services and communications for judicial scrutiny (as the Supreme Court of the United States has done in respect to the racial practices of school districts)? And what available sanctions have the Canadian courts to ensure compliance if Parliament, the provinces, or the local authorities neglect to appropriate the funds necessary to such compliance?

Significantly, the Charter does not provide for bilingual districts as recommended by the Royal Commission on Bilingualism and Biculturalism in its 1967 Report on Official Languages (Canada 1967, chap. V(c)). The Commission's recommendations had two major thrusts.

First, the Constitution should be amended to extend the provisions of Section 133 of the BNA Act to any province whose minority-language population reached more than 10 per cent and to any other province that voluntarily accepted English and French as its official languages.

Second, there would be constitutional provisions for bilingual districts in these terms:

> Whenever in any province the English- or French-speaking population of the appropriate administrative unit reaches a substantial proportion, this unit shall be constituted into a bilingual district, and there shall be enacted federal and provincial legislation making judicial and administrative services in such bilingual districts available in both official languages. (p. 149)

In a somewhat tentative way, the commission suggested that census divisions be regarded as the 'appropriate administrative unit' for constituting a bilingual district and that the required proportion of the official-language minority be 10 per cent.

The Official Languages Act of 1969 required the Governor in Council to constitute after each decennial census a Bilingual Districts Advisory Board to recommend to the government bilingual districts within the country. Two such boards have been constituted and made their reports in 1970 and 1975 respectively (Canada 1970, 1975), but in neither case has the government moved to accept these recommendations. In appearing before the Special Joint Committee of the Senate and House of Commons on the Constitution on November 17, 1980 the Commissioner of Official Languages asserted that the absence of bilingual districts 'has, in my view, hampered rather than expedited fulfillment of Parliament's wishes as reflected in the [Official Languages] Act.' (Canada 1980b, 6:12).

The absence of bilingual districts would appear not only to complicate the responsibilities imposed on the courts by Section 20(1) of the Charter but also makes it more difficult than it need be for members of official-language minorities to make effective claims for federal services and communications in their mother tongues. The districting principle imposes obligations on governments in areas where there is more than a defined

proportion of persons whose mother tongue is the other official language. 'Significant demand' imposes a much more rigorous standard of proof on such persons. Let us say, for example, that some citizens in an Ontario community with a significant proportion of persons of French mother tongue take their rejected requests for French services in the local post office to the courts under Section 20(1). The postmaster might well testify quite accurately that over the generations the Francophone citizens of the community had come to do their business with him and his officials in English. If the courts accepted the criterion of 'significant demand' as being the relevant one, the Francophones who desired these services most intensely would be required to mobilize other Francophones in these areas in their cause and perhaps change the linguistic habits that these persons had developed in dealing with the public authorities.

Section 23 of the Charter relates to rights of children to primary and secondary school education in the minority official language at public expense. These rights are restricted to children whose parents are Canadian citizens and, unlike those specified in Sections 16 to 22, prevail anywhere in Canada where there is a sufficient concentration of the official-language minority as defined by the Charter to make the provision of such facilities practicable. There appear to be certain ambiguities and anomalies in Section 23.

The entitlement of a child whose parents have not received their primary education in the minority official language will be determined by the linguistic region of that child's grandparents. For example, if two Italian families had emigrated to Canada and one chose to make English the family language and the other did not the rights of grandchildren of the two families would be different.

The Charter does not specify what the rights of a child would be if one parent qualified under Section 23 and the other did not. Is it reasonable to assume in such cases that the child would have the right to an education in the minority language?

There are possible anomalies in Section 23(2), which has the general intent of ensuring the rights of parents to have all their children educated in the minority language if one or more child has received or is receiving education in that language. Let us take two brothers, neither of whom qualifies under Section 23(1)(a) or (b), who move from Ontario to Quebec. One brother has a child who has been going to English-language schools in

Ontario and the other has a child who is too young to have attended school before the move. The right of the cousins will be different so far as English education in Quebec is concerned.

A much more serious difficulty relates to the where-numbers-warrant provisions of Section 23(3). This general phrase gives little guidance to the citizens who might assert such a right and the courts who would be responsible for defining it. Some of those who have commented on this provision have pointed out that modern methods of instruction make possible education where there is a very small concentration of children, and a significant number of Canadian children in isolated areas are instructed under such conditions. Yet surely such an education is inferior to that available to youngsters who have face-to-face contact with specialized and highly trained teachers, access to well-equipped libraries, gymnasia, and laboratories, and also a wide variety of extracurricular activities. Would the public authorities discharge their responsibilities to the official-language minority if the children of such persons had to undergo long bus-rides to get to school? Or if they were required to live in a residential school? If members of official-language minorities in a significant number of areas of Canada assert their right under the Charter in the courts we might expect a where-numbers-warrant jurisprudence to develop and, as in the case of other official-language facilities, the judges will in all probability have to come to such decisions in the absence of the guidelines of bilingual districts. Further, it is not altogether clear how the courts will enforce compliance from the provincial and local authorities where compliance requires the expenditure of public funds.

It is significant that those members of official-language minorities who qualify under the Charter are entitled to primary and secondary school facilities for their children from public funds but not to control over such facilities through elected school boards. I can see no defensible rationale for denying the minority the same privileges in this regard as are available throughout Canada to other parents. The report of the Ottawa-Carleton Review Commission, (Mayo 1976, 132-5) makes a persuasive case for a French-language school board, responsible for instruction from kindergarten through Grade 13, in that region. Despite the pretensions of the Charter to 'guarantee' the rights of official-language minorities, those minorities will be in an inferior position unless and until they gain the same measure of educational control at the local level as have their fellow citizens of the same province.

Chapter V

MOBILITY RIGHTS

Alexis de Tocqueville wrote in Democracy in America (Tocqueville 1954, 15) that 'I am informed, every morning when I wake, that some general and eternal law has been discovered which I never heard mentioned before. There is not a mediocre scribbler who does not try his hand at discerning truths applicable to a great kingdom, and who is very ill pleased with himself if he does not succeed in compressing the human race into the compass of an article.' A Canadian might be pardoned for thinking the same of our newly found mobility rights. We have very much taken it for granted from the first that unless the public authorities had ordered us in custody because of conviction for a criminal offence or of extreme emotional illness we would be able to move around freely within the borders of Canada and enter or leave the country at our discretion. Nothing was said about mobility rights in the document A Canadian Charter of Human Rights, introduced into the Constitutional Conference of 1968 by the federal government or in the discussions that led up to the Victoria Charter. Neither are such rights mentioned in the proposals for constitutional entrenchment made in the final report, published in 1972, of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada.

The constitutional entrenchment of the mobility rights of Canadians has come into constitutional discussion only since the late 1970s. So far as I can discover, the first analysis that dealt with this matter was contained in the report of the Canadian Bar Association Committee on the Constitution (1978, 89). The report affirmed that 'the Constitution of Canada should...guarantee the free movement of people, goods, services and capital within Canada'. This statement was contained in the discussions of the 'regulation of trade' and the federal/provincial division of powers believed necessary to secure the Canadian economic union. In a later chapter the report stated that 'free movement in Canada is inherent in

citizenship' (p. 129). Interestingly, this statement was made in the context of an analysis of the division of powers over 'citizenship, immigration and aliens' and the particular concern of the Committee was that provincial participation in immigration policy should not impede the free movement of persons coming into Canada.

The Constitutional Amendment Bill, commonly called Bill C-60, introduced into Parliament in June 1978, included this provision under the parts of the Bill specifying 'Rights and Freedoms within the Canadian Federation':

> 8. Every citizen of Canada, wherever the place of his or her residence or domicile, previous residence or domicile, or birth, has
>
> - the right to move and to take up residence in any province or territory of Canada, and in consequence thereof to enjoy the equal protection of the law within that province or territory in the matter of his or her residence therein, and
>
> - the right to acquire and hold property in, and to pursue the gaining of a livelihood in, any province or territory of Canada,
>
> subject to any general laws of general application in force in that province or territory but in all other respects subject only to such limitations on his or her exercise or enjoyment of those rights as are reasonably justifiable otherwise than on the basis of the place of his or her residence or domicile, previous residence or domicile, or birth.

Despite the explicitness of this section, the document, A Time for Action, published at the same time under Prime Minister Trudeau's signature and giving the philosophical rationale for the federal government's new initiatives on constitutional reform, did not mention mobility rights explicitly.

In recent years there has been an increasing concern among some economists and students of economic policy about provincial restrictions on the free movement of people, goods, and capital within the boundaries of Canada. The fullest analysis of this matter is A.E. Safarian's study prepared for the federal government; he wrote, 'The main conclusion in this paper is that constitutional revision is necessary to guarantee more fully the common market and economic union basis of the federal state. This basis is susceptible to considerable erosion and is incapable of adequate realization in the absence of a strengthened [constitutional] guarantee. The ultimate result is a loss to all Canadians' (1974, 96).

Safarian's general recommendations proceeded in the direction of extending the provisions of the existing Section 121 of the BNA Act, which enjoin provincial restrictions on the movement of goods, to include people, services, and capital. His general focus of concern was that of the liberal economist who proceeds on the assumption that ceteris paribus any internal restriction on the movement of the factors of production will decrease the material welfare of a community.

In the round of constitutional discussions of the summer and early fall of 1980 the federal government took up the cause of mobility aggressively. Ottawa's general strategy appears to have been to be willing to enhance provincial powers over natural resources only if the provincial governments were willing to agree on constitutional reforms to secure the Canadian economic union. A major discussion paper called 'Powers over the Economy: Securing the Canadian Economic Union in the Constitution' was introduced into the negotiations by the government on July 9, 1980 (Canada 1980a). This document outlined three alternative devices: the constitutional entrenchment of the right of citizens to work and acquire property in any province, extending Section 121 of the BNA Act along the general lines recommended by Safarian, and broadening federal powers to secure the economic union. The discussion paper did not opt for any of these alternatives. However, its substance and tone was that of the economic policy-maker and there was nothing in it to suggest that Canadians have an inalienable and imprescriptible right to move freely within their country and to enter and leave Canada as they wish.

The Charter deals of course with only the mobility rights of persons and not the mobility of goods, services, and capital. Section 6(1) says: 'Every citizen of Canada has the right to enter, remain in and leave Canada.' So far as I am aware, the laws and practices of the federal government have fully recognized this right. Section 6(2) goes on to specify the rights of citizens and permanent residents of Canada to move to and take up residence in any province and to pursue the gaining of a livelihood in any province. These latter rights are subject to the qualifications of 'reasonable residency requirements' for public services and to laws of general application that do not 'discriminate among persons primarily on the basis of province of present or previous residence'.

The discussion paper outlines several instances in which prevailing federal and provincial laws and regulations appear on the surface to be

incompatible with Section 6 of the Charter. For example,

- in action taken under the Northern Pipeline Act the employer (Foothills) is required to give preference to local residents along the pipeline route.

- several of the Department of Regional Economic Expansion (DREE) agreements require employers to give employment preference to local residents.

- Newfoundland legislation for the development of oil and natural gas requires every person holding a permit or lease to give preference in employment 'to qualified residents of the province', with such residency defined as three years prior to 1978 and ten years at any time.

- Quebec law regulating the construction industry divides the province into thirteen construction regions and gives residents preference in employment in their region.

- the public service regulations of Quebec and Nova Scotia require that provincial residents be given preference in employment.

Beyond laws and regulations that explicitly provide for local or provincial preference in employment, there are other governmental restrictions on the mobility of persons.

- the provinces have different requirements for licencing in trades and professions.

- Prince Edward Island restricts the land-ownership rights of non-residents of the province.

- at least half the directors of a company chartered in Alberta must be Alberta residents and Canadian citizens.

As is the case with other parts of the Charter, one can only conjecture about the way in which the courts will interpret Section 8. Explicit local and provincial preferences in employment would appear to be entirely irreconcilable with the Charter. The courts might have very great opportunities for discretion in respect to some of the less direct challenges to mobility rights; for example, they might have to decide if the

'gaining of a livelihood' refers only to employment or to forms of economic activity such as being a company director or owning land for productive purposes.

Section 6(2) says that the mobility rights of citizens or permanent residents may be qualified by 'reasonable residency requirements' for eligibility to publicly provided services. Under Ottawa's leadership the regime of hospital and medical insurance has been successful in frustrating barriers to mobility, which might otherwise have been erected by provincial eligibility rules. In general terms, the provincial plans have uniform residency rules and when a person leaves one province his coverage continues until he becomes a resident of the province to which he has been moved. Analagous results in respect to income assistance have been achieved under the Canada Assistance Plan. Unlike some of their American counterparts, Canadian universities do not charge provincial residents lower fees than other Canadian citizens or landed immigrants. Provincial and local residence requirements respecting eligibility for public services thus do not seem to be important barriers to mobility. It is possible that the situation might change by one or more of the wealthier provinces erecting such barriers. There has been some recent concern in Alberta about the large number of persons without immediate employment opportunities and needed skills coming to the province, and long eligibility periods for access to public services might be a device to discourage such immigration. A province that provided public services at higher-than-average levels might have similar incentives for discouraging persons to come to the province to take advantage of such services. Under such circumstances the courts might well be required to make difficult policy decisions about mobility rights.

Chapter VI

EMERGENCY POWERS AND THE CHARTER

Regimes based on liberal and constitutional principles have a major difficulty in respect to emergency powers. By definition, an emergency is an unusual and nonrecurrent situation that requires that those who are charged with meeting it have a broader range of powers than in normal times to determine both the nature of that situation and the appropriate action necessary to deal with it. Yet the essence of constitutionalism is that citizens should have in John Locke's words 'a standing rule to live by'. (It might be mentioned parenthetically that one of the ommissions of the Charter is a prohibition against ex post facto laws - that is, the creation of legal offences that were not offenses at the time they were committed, and to me this appears to be one of the few constitutional imperatives that can defensibly be defended as an absolute.) Various constitutional regimes deal with emergency powers in different ways. The Constitution of the United States contains very few and relatively specific provisions respecting emergencies, and the late Clinton Rossiter wrote of the American constitutional tradition, 'The traditional theory of the Constitution is clearly hostile to the establishment of crisis institutions and procedures. It is constitutional dogma that this document foresees any and every emergency, and that no departure from its solemn injunctions could possibly be necessary' (Rossiter 1963, 212). At the other end of the spectrum, the 1949 Constitution of India conferred on the federal executive sweeping powers to deal with situations caused by war, internal disturbances, and the inability of the state, as determined by the national government, to carry on its affairs in accord with the Constitution or to maintain financial stability; these powers have been brought into play on several occasions and in 1977 Prime Minister Gandhi, acting within the terms of such powers, established an authoritarian regime and jailed the most powerful of her political opponents.

In the Canadian case, emergency powers can be discussed within two different contexts - that of a peacetime economic emergency and that of 'war, invasion, or insurrection, real or apprehended'. The first need not concern us much here. In its 1977 decision upholding the federal anti-inflation legislation of 1975 the majority of the Supreme Court of Canada in effect established that it is constitutionally permissible for Parliament to enact legislation in areas of jurisdiction otherwise provincial in order to deal with what Parliament decides to be a peacetime economic emergency.[1] There is now extant law conferring on the federal authorities sweeping powers to allocate energy supplies when Ottawa decides there is a shortage of them. However, the effect of the exercise of such emergency powers is the overriding of the rights of the provinces rather than of human rights as defined in the Charter. It might perhaps be possible for the federal government to conjure up some rationale for infringing on human rights in dealing with a peacetime economic emergency, but in any but the most unusual circumstances one might hope and expect that the courts would find such action constitutionally invalid.

The second class of emergency is that occasioned by, in the terms of the War Measures Act, 'war, invasion, or insurrection, real or apprehended.'[2] The War Measures Act was enacted by Parliament in 1914 just at the beginning of the First World War and was a counterpart of the Defence of the Realm Act enacted by the United Kingdom Parliament at the same time; the latter act was repealed in 1918, the War Measures Act has remained a Canadian statute. In effect, the War Measures Act when proclaimed by the Governor in Council replaces the normal conditions of a parliamentary and federal state by what Rossiter calls a 'constitutional dictatorship' of the federal cabinet. When the act is proclaimed, the cabinet can do and authorize to be done for the 'security, defence, peace, order and welfare of Canada' things that would in normal times require the action of Parliament or of the provinces. Section 2 of the act states:

> The issue of a proclamation by Her Majesty, or under the authority of the Governor in Council, shall be conclusive evidence that war, invasion, or

1 Anti-Inflation Reference 2 S.C.R. [1976]. 373. Significantly, the Act itself did not explicitly declare the inflationary conditions to constitute an emergency.

2 For a discussion of the legal and constitutional issues here see Tarnopolsky 1975, Chapter 9.

insurrection, real or apprehended exists and has existed for any period of time therein stated and of its continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists.

This section is what lawyers call a 'privative clause', a clause that is directed towards excluding judicial review of an executive act. In the Anglo-Canadian legal tradition the courts have vigorously resisted such exclusion. However, it is almost impossible to imagine circumstances in which the judiciary would seek to substitute its judgement for that of the cabinet in respect to the existence of 'war, invasion, or insurrection, real or apprehended'. It might also be noted that in judicial decisions after the First and Second World Wars the courts affirmed the validity of the exercise of emergency powers, not only during the actual hostilities but subsequent to this as the government took steps to facilitate the transition to peacetime conditions.[3]

In terms of the rights contained in the Charter, these emergency powers of the federal executive may be noted:

- Section 3(1) authorizes action in respect to '(a) censorship and the suppression of publications, writings, maps, plans, photographs, communications and means of communication' and '(b) arrest, detention, exclusion and deportation'. In employing a phrase from the opening words of Section 91 of the BNA Act, these and other enumerated powers are granted 'for greater certainty but not so as to restrict the generality' of the matters contained in the enumeration.

- Section 4 provides that the Governor in Council may prescribe penalties for violations of orders and regulations made under the Act, with the limitation that 'no such penalty shall exceed a fine of five thousand dollars or imprisonment for any term exceeding five years, or both fine and imprisonment.'

- Section 5 provides that 'No person who is held for deportation under this Act or under any regulation made thereunder, or is under arrest or detention as an alien enemy, or upon suspicion that he is an alien enemy, or to prevent his departure from Canada, shall be released upon bail or

3 Fort Frances Pulp and Paper Co. v. Man. Free Press, [1923] A.C. 695 and Wartime Leasehold Regulations Reference [1950] S.C.R. 124.

otherwise discharged or tried, without the consent of the Minister of Justice.'

When Parliament enacted the 1960 Bill of Rights two changes were made in the War Measures Act.

Section 6(2), (3), (4) associated Parliament with the executive in the War Measures Act regime. Any proclamation bringing the Act into effect was required to be laid before Parliament 'forthwith...or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting.' It was also provided that when the Act was in effect ten members of either House might call for an early debate on the emergency and that if after such debate a majority of both Houses so decided the proclamation of emergency would be revoked.

Section 6(5) provided that 'Any act or thing done or authorized or any order or regulation made under the authority of this Act, shall be deemed not to be an abrogation, abridgment or infringement of any right or freedom recognized by the Canadian Bill of Rights, 1960.'

Until mid-October 1970 Canadians had regarded the War Measures Act entirely in terms of the context of international hostilities. However, in the earlier hours of the morning of October 16 the Governor in Council proclaimed the act in effect and the public order regulations were issued under its authority. The regulations declared illegal certain associations and certain actions in attempting to effect political change by force or violence - in some instances enacting in an ex post facto fashion. Peace officers, including members of the Armed Forces, were given sweeping powers of search and arrest without warrants, and at the discretion of the attorney-general of a province, persons might be detained up to twenty-one days before being charged with an offence under the regulations. Some 497 persons were arrested under the emergency regime, of whom by February 1971, 465 were released and 32 were still detained (Tarnopolsky 1975, 346)[4] In December 1970 a new enactment of Parliament gave a somewhat more limited discretion to the executive than had the regulations and the condition of emergency was ended by proclamation on April 30, 1971. At the time of the October crisis both members of the government and other persons stated that it would be desirable to have other legislation

4 See more generally his account of the October crisis, pp. 331-47.

than the War Measures Act to deal with domestic disturbances. However, this intent soon lapsed; the War Measures Act remains a Canadian statute.

There are then two Canadian constitutions - the one in effect most of the time, the other when the War Measures Act has been proclaimed. As we have seen, the 1960 Bill of Rights gives explicit permission to the Governor in Council to override the rights contained in the Bill when the War Measures Act regime prevails. To a nonlawyer the relation between the Charter and the Diefenbaker Bill of Rights is unclear; the schedule to the parliamentary resolution, which outlines its effects on other constitutional instruments now in force, does not contain any reference to the Bill.

The Charter contains only one reference to emergency circumstances. Section 4(2) states:

> In times of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the Legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the Legislative assembly, as the case may be.

In the discussion of the Charter before the Special Committee the government refused to accept the suggestions of several of the witnesses and of the opposition party spokesman that 'imminent' be substituted for 'apprehended'.

In his testimony before the Special Committee the Solicitor General, Robert Kaplan, made two basic points (Canada 1980b, 40:28-30). First, in the opinion of the government's legal advisers, 'the War Measures Act would survive judicial scrutiny in terms of the presently proposed Charter of Rights and Freedoms.' Second, when and if the War Measures Act is proclaimed the courts would review the reasonability of actions taken under its provisions.

Would, or should, the courts review the actual existence of 'war, invasion, or insurrection, real or apprehended'? Tarnopolsky concludes his book on the Canadian Bill of Rights with these words:

> ...one fact remains to haunt anyone concerned with the operation of the Canadian Bill of Rights: it is a cabinet and not a court of law which decides what constitutes 'war, invasion, or insurrection, real or apprehended' sufficient to invoke the War Measures Act, which overrides the Bill of Rights. (Tarnopolsky 1975, 347-8)

A more defensible view was put forward by the Canadian Bar Association Committee on the Constitution (1978, 141). 'We considered but rejected special procedures for the judicial review of the Parliamentary declaration of an emergency. We do not wish the courts to become involved in such a highly political exercise.' Whatever position one takes, it's unlikely that any court would pit its judgement against that of a cabinet in challenging a proclamation under the War Measures Act.

But once a War Measures Act proclamation is in effect how likely are the courts under the terms of the Charter to challenge acts taken by the executive in terms of reasonability? Again it is difficult to believe that the Canadian judiciary would be aggressive in overturning acts taken by an executive that believed them necessary to meet an emergency.

In international legal circles there has been some attempt to distinguish between those rights that might validly be abrogated under emergency conditions and those - for example, the right not to be tortured - that might not be so infringed upon. According to Dr. Barry Strayer, the assistant deputy minister for public law in the Department of Justice, these attempted distinctions remain somewhat arbitrary (Canada 1980b, 38:46-7). At any rate, during the discussion of the Charter in the Joint Committee the government resisted the attempts of Svend Robinson of the NDP to define some basic rights that might not be abrogated even under emergency conditions (Canada 1980b, 47:72-5).

The Charter then would seem not to challenge the regime of two constitutions - one in which rights receive extensive protection through the Constitution and actions taken under its authority, the other in which rights exist at the discretion of the federal cabinet for whatever period the cabinet believes necessary to meet an emergency.

Closely related to emergency powers are powers in regard to national security. Unfortunately perhaps, it is likely that the Charter will become part of the Constitution before the publication of the report of the Commission of Inquiry concerning Certain Activities of the Royal Canadian Mounted Police. It is reasonable to hope that later this document will provoke an informed discussion of the issues it was called upon to review and of matters concerning the protection of human rights more generally.[5]

5 Three useful research studies undertaken under the auspices of the Commission have already been published - Franks (1979), Edwards (1979), and Friedland (1979).

Chapter VII

THE PROBABLE CONSEQUENCES OF THE CHARTER

In this concluding chapter I shall try in a tentative way to outline the probable consequences of the Charter for human rights in Canada, the position of the judiciary in the Canadian system of government, and Canadian political culture.

The Charter and human rights in Canada

In two important ways the Charter will certainly safeguard some rights against future legislation or administrative action abrogating them:

First, some of the rights contained in the Charter - but very few - are stated so explicitly that there is left little doubt about their meaning and effect. These include:

- the 'democratic rights' of Sections 3 and 4 providing respectively (1) that every citizen of Canada has the right to vote in an election for members of the House of Commons or of a provincial legislature and is qualified to become a member of those bodies, and that (2) no House of Commons or provincial legislative assembly shall continue for more than five years except under emergency conditions specified in the Charter when the life of a House of Commons or a provincial legislature may be extended.

- Section 5 provides that there shall be a sitting of Parliament and each provincial legislature at least once every twelve months.

- Section 6 provides that every Canadian citizen have the right to 'enter, remain in and leave Canada'.

- Sections 17, 18, and 19 in effect apply the present very explicit official-language rights, which are contained in Section 133 of the BNA

Act, to Parliament and the legislature of New Brunswick and to any 'pleading or process' in the courts established by these legislatures.

Second, the Charter at one stroke eliminates the present uncertainties about human rights by removing these questions from the context of the division of legislative powers between Parliament and the provinces. Apart from Section 133 of the BNA Act and Section 23 of the Manitoba Act related to the English and French languages and Section 93 of the BNA Act specifying the rights of Roman Catholic and Protestant minorities in education, a judicial challenge to a law allegedly abrogating human rights can now be mounted successfully only on the grounds that Parliament had encroached on the legislative jurisdiction of a provincial legislature or vice versa. The delineation of federal and provincial powers under the constitution as judicially interpreted is complex and certain important ambiguities remain unresolved (see Tarnopolsky 1975, chap. 2). The Charter would eliminate these ambiguities and make it inconsequential what order of government has trespassed on what the courts define as rights.

Despite the preceding, the enactment of the Charter will create new uncertainties about the definition of human rights. The Charter is honeycombed with general terms that have no accepted meaning in Canadian law - 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society', 'according to the general principles of law as recognized by the community of nations', 'the amelioration of the conditions of disadvantaged individuals or groups', 'significant demand for communications with and service from...in such [minority official] language', the where-numbers-warrant provision related to education in the minority official languages, 'reasonable residency requirements as a qualification for the receipt of publicly-provided social services', and so on. In the very nature of judicial review, it will take the courts decades, perhaps even generations, to give stable and authoritative meaning and effect to such broad terms.

But how will judges act in interpreting the Charter? More specifically, what will be the decisive determinants of judicial behaviour in the role imposed by the Charter on the courts?

It would be unrealistic to discount completely the personal commitments of the judges, most crucially of course members of the Supreme Court of Canada, to libertarian and egalitarian values and their sympathies

with or antipathies for the individuals and groups who appear as litigants before them in cases involving the Charter. However, a more important determinant of judicial conduct is likely to be the set of dominant judicial values, particularly those related to the appropriate role of the courts in the protection of human rights and the desirability of the courts challenging legislatures and executives in performing this role. This is so because we can expect judges as professionals to want their opinions to be highly regarded by others whom they respect as professionals. This public includes other Canadian judges, the more distinguished members of the legal profession, and legal scholars and other persons with specialized legal knowledge who make continuing commentaries on the work of the courts. At a seminar some years ago an American scholar suggested that sovereignty in the United States resided in the Harvard Law Review. His half-serious argument was that the Constitution is sovereign but that the Constitution is what the Supreme Court says it is and that members of the Court respond to those who evaluate their performance in the most respected legal journals. In a less extreme way Peter Hogg (1979) has written, in his attempt to refute the charge that the Supreme Court of Canada is biased in favour of the federal government as against the provinces:

> The objective fact of judicial independence would not preclude the existence of a sycophantic psychology [towards the government which appointed them] on the part of the judges. The fact here, however, is that the judges are all longstanding members of the legal profession; in most cases they have been engaged in the private practice of law; they have all been nurtured in a professional tradition which is highly unsympathetic to governmental authority, especially when exercised from Ottawa; and they are unlikely to have developed attitudes which are unduly deferential to the federal government. The strong likelihood is that they value the assessment of their work by the legal profession infinitely more highly than they value the opinions of the members of the federal cabinet and civil service. The reputation of a judge in the legal profession is established partly through scholarly writing but mainly through informal discussion among lawyers, and it develops primarily as a professional assessment of craftsmanship and fairness. The judge who could always be counted upon to vote for the federal government would be regarded with contempt by the profession.

There are alternative judicial values that might be brought to bear as the courts gave meaning and effect to the provisions of the Charter. In the American context, these alternative values are usually designated as

judicial activism and judicial restraint. Another formulation might see a judge of the Supreme Court of Canada in any one of the following roles in his approach to the Charter:[1]

- the literalist. The judge's primary cues here are the accepted legal meaning of the words of the Charter and previously decided cases by the Court itself, the Judicial Committee of the Privy Council, and perhaps other courts outside Canada. Because many of the broad terms of the Charter are new to Canadian jurisprudence, this will mean a heavy reliance on the decisions of foreign courts and international or supranational legal tribunals.

- the crusader. The judge here is certain enough of himself, his values, and what he believes the Charter to mean to be willing to challenge executives and legislatures in a self-confident and aggressive way. This general stance was recommended by J. Noel Lyon and Ronald G. Atkey (1970, 377) in their textbook on Canadian constitutional law:

> If a fundamental rights issue is clearly perceived, a court should attempt to meet the issue head-on, and should be loathe to allow any level of government to deny this right through claims that it is merely acting within its own proper sphere of legislative jurisdiction. This is no easy task for a court in view of the wide sweeping nature of some of the heads of jurisdiction of Sections 91 and 92...Yet we believe this task can be performed imaginatively and well by legally trained men willing and able to apply their minds to the creation and preservation of a free society. (Emphasis in text.)

The Lyon-Atkey prescription was advanced outside the regime of constitutionally entrenched human rights. For judges who conceive their function in this way, the Charter would of course be a powerful additional rationale for their activism.

- the policy scientist. The judge who assumes this stance is primarily guided by the psychological, social, and economic consequences of judicial decisions. Thus he puts a heavy reliance on scientific evidence. For example, in coming to a decision about 'cruel or unusual punishment or

1 I use with some revisions of my own the categories outlined by Harry Arthurs of the Osgoode Hall Law School in a panel discussion on the Charter sponsored by the University of Toronto Law School in November 1980.

treatment' the judge might give consideration to the deterrent effects of hanging, when making judgements about the rights to education of official-language minorities he might take into account the fiscal capacity of the local authorities concerned to bear such costs and the psychological consequences to the children involved of such education not being available.

- the deferentialist. A judge in this category is very reluctant to challenge either elected legislatures and governments or executive agencies and officials working under the control of those elected bodies. The view here is that on normative grounds in most circumstances it is inappropriate for courts to substitute their judgements for the judgements of those who are charged with the immediate responsibilities of government. It is likely that this disposition would be combined with a modest appreciation of the actual capacity of courts to effect social change or to protect values and interests challenged by those other organs of government that reflect prevailing opinions and the distribution of power in society more accurately than does the judiciary.

There are of course several possible combinations of the stances outlined. For example, there is a congruence between the literalist and deferentialist approaches to the judicial function, and the judge who emerges as a crusader might well rely heavily on the kinds of evidence that appeal to the policy scientist as being relevant. Further, it is possible, even probable, that the courts will be more aggressive in defending some kinds of rights than others - perhaps being activists in respect to, say, legal rights and deferentialists when egalitarian rights are being pressed.

How the courts will approach the Charter remains in the realm of conjecture. The Quebec Minister of Justice commissioned the Montreal legal firm of Courtois, Clarkson, Parsons, and Tetrault to make a survey of extant Quebec law and administrative orders that might be incompatible with the provisions of the Charter and this legal report, dated February 25, 1981, noted 105 possible incompatibilities with the qualification that the survey did not claim to be exhaustive.[2] The broad test they had used

2 I am obligated to the Office of the Quebec Government in Toronto for a copy of this mimeographed report.

was the jurisprudence of the Supreme Court of the United States in respect to circumstances where the provisions of the Charter conform broadly to the U.S. Constitution. In my view, a better indication of the possible stance of the Supreme Court of Canada to the Charter would be the previous tradition of this Court in judicial review of the BNA Act. This has been characterized in the past generation by the literalist-deferentialist approach as these stances has been outlined above, and Peter Hogg (1977, 88) has written:

> Judicial restraint in determining the validity of statutes may be expressed in terms of a 'presumption of constitutionality'. Such a term transfers from the law of evidence the idea that a burden of demonstration lies upon those who would challenge the validity of a statute which has emerged from the democratic process. It cannot be said that a presumption of constitutionality has been recognized in Canada as a general principle of judicial review. However, the Supreme Court of Canada has been more restrained in judicial review than was the Privy Council, and its practice may perhaps be regarded as consistent with a presumption of constitutionality.

Gilbert L'Ecuyer (1978) in his study of the Supreme Court's interpretation of the division of legislative powers between 1949 and 1978 came to the same general conclusion; the Court had followed to a more marked degree than had the Privy Council a literal interpretation of the BNA Act. In the more restricted context of human rights, the Court has been relatively unaggressive in not being willing to challenge legislation or executive acts as being contrary to the Diefenbaker Bill of Rights,[3] although in many of these decisions a minority of the Court opted for a more assertive stance. It seems unreasonable to expect in the short-term future of a decade or so that the Court in interpreting the Charter will completely abandon its former dispositions towards a presumption of constitutionality.

One important dimension of activism versus restraint in judicial interpretation of the Charter will be what is done about providing remedies for those persons or groups whose rights have been abrogated. In the Hogan case, decided by the Supreme Court of Canada in 1975, it was found that Hogan's 'right to counsel' under the 1960 Bill of Rights had been infringed

3 See generally Tarnopolsky (1975, chapters 5 - 8) and Hogg 1977, chapter 25.

but a majority of the Court decided that no remedy could be granted.[4] Section 24(1) of the Charter apparently tries to correct this situation:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

In some circumstances an adequate remedy for those whose rights have been infringed upon or denied might be obtained by a court declaring the law or administrative order challenged to be of no effect, and so far as legislation is concerned the courts are clearly directed do so by Section 58(1) of the Canada Act, of which the Charter is a part:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Yet there are several provisions of the Charter where an effective remedy could not be obtained by such judicial action. Most crucially such rights as those of the physically handicapped and of official-language minorities in respect to education depend on positive action by the public authorities and the expenditure of public funds. However under the British parliamentary tradition only the executive can initiate measures for the raising and appropriation of public funds, and this circumstance is explicitly provided for in Section 53 of the BNA Act. Although an aggressive judiciary might develop some ingenuity in devising remedies other than those of striking down laws and administrative orders deemed invalid under the Charter, it would appear that in the Canadian system of government, legislatures and executives have at their disposal effective methods to resist the courts, particularly in respect to circumstances in which rights depend on positive government action.

What has been said here relates to the activities of the courts in interpreting the Charter in cases that do come before them. The volume of such cases will be determined by the actions of the courts themselves and by those of private individuals and groups who mount judicial challenges under the Charter to legislation or executive acts.

4 Hogan v. R. [1975] 2 S.C.R. 574.

The appellate courts of the provinces have the power to grant leave to appeal from their own decisions to the Supreme Court of Canada and the Supreme Court itself may decide to hear appeals from other courts when the Court decides that important issues of law are involved. In recent years the Court has also shown a disposition to extend the basis of legal standing; i.e. to make it easier for persons and groups to claim that they have sufficient interest in particular actions to mount judicial challenges to such actions.[5] Thus the judiciary, most crucially of course the Supreme Court of Canada, has considerable grounds of discretion in determining what cases involving the Charter it will decide, although even in the case of this Court most matters with which it deal are brought as of right by litigants or on reference from cabinets.

The enactment of the Charter invites individuals and private groups to appeal to the courts in defence of their rights. One can only speculate about the extent to which this challenge will be taken up. The uncertainty about the meaning and effect the courts will give to the Charter can be expected to be in itself an encouragement to civil rights litigation. Further, in a period when there is coming to be an oversupply of lawyers one can foresee the development of a group of lawyers specializing in Charter litigation and, as in the case of other professionals, the suppliers will create the demand for their services.

Yet other uncertainties remain. For example, what proportion of their resources will feminist groups and groups representing handicapped persons devote to judicial action as against lobbying legislatures and executives or attempting to influence public opinion? What help will public legal-aid schemes give to individuals and groups who seek to defend their rights under the Charter? Apart from provincial legal aid, will governments give direct financial assistance to groups in meeting the costs of legal action? Will the enactment of the Charter encourage the development of organizations, such as the Canadian Civil Liberties Association, that devote part of their resources to legal action in defence of human rights?

In summary, the enactment of the Charter will bring about more uncertainty than before existed about the precise nature of human rights as defined and recognized by the Canadian Constitution. Admittedly, the

5 See particularly Thorson v. A.G. Can. [1975] 1 S.C.R. 138. On standing generally see Strayer (1968, 96-114).

Charter eliminates some of the previous uncertainties. A very few human rights are entrenched in such explicit language as not to leave any doubt about their meaning. At one stroke, the Charter eliminates the ambiguities and complexities of the federal-provincial division of legislative powers relating to such rights as are entrenched. And of course the Charter can be explicitly changed only by resort to a relatively inflexible procedure of constitutional amendment. Yet on balance these certainties are outweighed by the uncertainties. Some of the more crucial provisions of the Charter are phrased in very general terms and it will take the judiciary a very long time to give those terms a stable and authoritative meaning in law. One can only conjecture about whether the judiciary, most crucially of course the Supreme Court of Canada, will be aggressive in challenging legislatures and executives as cases involving human rights come before them. And it is impossible to make any confident predictions about how much encouragement the Charter will give to individuals and groups who seek to defend their rights.

In my view, some of the more enthusiastic supporters of the Charter have vastly exaggerated its capacity to 'guarantee' human rights. The recent Canadian record in respect to human rights is a relatively favourable one, despite the fact that under Canadian law all but a few rights can be encroached upon or denied by either Parliament or a provincial legislature; to take one quick test, Canada is one of the relatively few nations of the world that escaped mention in the 1980 Report of Amnesty International, although in such relatively liberal countries as the United Kingdom, the United States, France, the Federal Republic of Germany, and Israel offences against human rights that came to Amnesty's attention occurred. To suggest that the Charter will by itself bring about a radically new Canadian regime in respect to rights is superficial and misleading.

The Charter and the new role of the courts in the Canadian system of government

The Charter is an explicit directive to the courts to overturn laws and executive acts deemed contrary to its provisions. As we saw in Chapter 2, many of the witnesses appearing before the Special Joint Committee criticized the sweeping nature of the exceptions of Section 1 of

the resolution introduced into Parliament in October 1980 and the revised version of Section 1 went a considerable way towards meeting these objections. Section 58(1) says, 'The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.' Section 24(1) gives the courts sweeping powers to give remedies to those whose rights under the Charter are infringed upon or denied.

The clear intent of the Charter is then to assign the judiciary, most importantly of course the Supreme Court of Canada, a new role in the Canadian system of government. Many civil libertarians in Canada have been critical of the Court for what they have regarded as its unduly unaggressive stance in relation to the 1960 Bill of Rights and the language of the Charter has quite obviously been chosen in an attempt to give a more positive directive to the judiciary in respect to human rights.

Canadians appear to be a relatively deferential people in the face of the organs of public authority and nowhere is this more apparent than in their attitudes towards the courts. As leader of the NDP, the late David Lewis in 1972 impugned the impartiality of the judiciary in relation to certain strikes in the Quebec public service and was subjected to severe criticism of this by the media and his political opponents. Governments in Canada, presumably in harmony with prevailing public opinion, continue to appoint judges as members of royal commissions, agencies to redraw electoral boundaries and so on and assign other extra-judicial tasks to them. When Bernard Blishen (Blishen et al. 1961, 481-4) ranked occupations according to income, years of schooling, and sex, his results assigned judges the highest possible status (judges rated 90.0, compared to 78.8 for lawyers, 61.0 for clergymen, and 37.5 for farm labourers); although his data were from the 1951 census, it is unlikely that more recent statistics would show any significant change.

The relatively high regard in which Canadian courts are held is accompanied by what Peter Russell (1975, 79) has called 'a very unrealistic image of the judicial role'.[6] According to the prevailing notions, the legislature enacts laws, the executive carries out such laws and the courts impartially interpret them according to well-established legal rules and

6 I am indebted to Russell's analysis in this part of my paper.

procedures. Despite the high status we confer on them, we do not ordinarily regard judges as powerful persons any more than we regard, say, surgeons or airline pilots as being powerful in their professional roles.

The Charter will quite clearly require the courts to make decisions largely on political grounds. 'Political decisions' in this context may be defined as choices among competing values or interests based on considerations other than those of explicit and pre-existing rules or of the imperatives of a recognized skill or profession. Let us take the simple examples of a clerk being appointed to the federal public service and a recommendation being made by the Prime Minister to the Queen about the appointment of a Governor General. In the first case specified things must not under the Human Rights Act be taken into account (sex, race, religion, marital status, etc.), the requirements of the position are explicit, and with some rough accuracy it is possible to assess the capacity of the applicants to perform these tasks by reference to their previous work records and to simple tests designed by the appointing authority. So far as the political decision of choosing the future Governor General is concerned, all the opposite conditions prevail. Similarly, the auditing of the books of a business is expected to be done in a nonpolitical way, although a Marxist would of course claim that these auditing procedures themselves are based on underlying political/ideological assumptions and in the same sense Gilbert L'Ecuyer (1978) has asserted that the Supreme Court of Canada has impartially interpreted the 'vision centralisatrice' of the BNA Act of 1867.

To repeat, the Charter will require the courts to make decisions largely on political grounds as I have defined the term. Judicial review of the Constitution characteristically requires some element of political judgement. Yet to say this is not to imply that such judgements are wholly political but rather to assert that they are not and cannot be mechanically deduced from pre-existing law or even by distinguishing among alternative legal precedents. The process is an extraordinarily subtle one, and there are fundamental disagreements about its nature, even among those who are directly involved in it and those who are specialists in the study of judicial behaviour. The situation is immensely complicated by the reluctance of judges in the Anglo-Canadian tradition to acknowledge the political nature of their role in judicial review of the Constitution. Judicial

decisions are usually written so as to imply that they have been reached by legal reasoning exclusively. What lawyers call 'extrinsic evidence', such as that related to the legislative history of measures and their social and economic context, is either not given judicial notice or defined very restrictively.

Until a very considerable body of jurisprudence relating to the Charter is developed, it is inevitable that the political as against the purely legal component of judicial decisions relating to human rights will be very high. An important question is the degree to which this will be explicitly acknowledged by the courts and the extent to which they will take judicial notice of a broader range of evidence than it is in their tradition to do. However, to a layman at least, it would seem impossible for the courts to decide, for example, whether the numbers of parents in an official-language minority warrant schools in that language or whether certain legislative and administrative measures deny a group 'the equal benefit of the law' without taking into account the context of the situations in which such rights are being pressed.

Whatever the actual extent of the politicization of the courts, as I have defined the term 'political', it is inevitable that the Charter will project the courts - most importantly the Supreme Court of Canada - into becoming more visible and contentious actors in the Canadian system of government. So far as the Supreme Court is concerned, this will be an acceleration of a trend that began in the mid-1970s. The Court was established in 1875 but for the first century of its existence there was little public awareness of it as an important institution of the Canadian system of government. Until 1949 the Judicial Committee of the Privy Council was the final appellate tribunal in Canadian constitutional matters and the Court was involved not so much in interpreting the Constitution as such but what the Privy Council had said about the Constitution; further, a very large number of constitutional cases coming before the latter body did so on appeal from the provincial courts, bypassing the Supreme Court of Canada entirely. In the twenty-five years or so following 1949 the Court decided an average of three or four constitutional cases each year, and while these decisions had a significant collective impact on delineating the division of the legislative powers, they did not bring the Court into contention with the most powerful political forces in Canada or cause the attentive publics of Canadian politics to give the Court much notice.

From the mid-1970s onwards the Court has become a more visible actor in Canadian public affairs. A larger volume of cases involving judicial review of the Constitution is coming before the Court - in the first five years of the 1970s there were only nine such decisions, in the latter half of the decade, thirty-six. More crucially, many recent decisions have involved vigorous contentions among governments - cases concerning natural resources, telecommunications, tax powers, language rights, the federal emergency power, and so on. The reference on the federal government's constitutional resolution, brought before the Court on appeal in May 1981, involved the Court in a conflict that ranged all the eleven governments on one side or the other; supporters of the resolution did not believe it to be an appropriate matter for judicial review.

In the wake of the increasing involvement of the Supreme Court in highly contentious decisions related to the division of powers, those provincial governments who believe their interests to have been threatened by such decisions have become increasingly critical of the Court and the appointment of its members by the federal government alone. Premier René Lévesque of Quebec has quipped that the Court is like the Tower of Pisa in that it leans in only one direction (i.e. towards the federal government). Alberta's Premier Peter Lougheed (1980, 203) said this in his opening speech to the First Ministers' Conference on October 30, 1980:

> Why do we conclude that the decision-making process in Canada is far too centralized? There are many examples, but perhaps the most significant is the unilateral imposition by the federal government of rigid controls over prices and wages on all Canadians - confirmed by the federally appointed Supreme Court of Canada. More recently, interpretations by the Supreme Court of Canada of the Federal trade and commerce power have called into question provincial rights as they have been known and understood for decades. This trend towards over-centralization has significantly threatened the cornerstones of the federal system and has contributed significantly to the fragmentation of Confederation. Alberta is not alone in opposing the erosion of provincial rights nor...is it the only province to express concern about the increasing involvement of the Court in the framing of public policy.

Premier Blakeney has also been vigorously critical of the Court's recent decisions affecting provincial powers over natural resources.[7] In

7 See the 1977 telex from Blakeney to Trudeau just after the CIGOL decision, which found invalid Saskatchewan laws and regulations respecting royalties and taxes (Reprinted in Canada 1978, 231-3).

short, some or even most of the provincial governments have ceased to regard the Supreme Court as a neutral arbiter of the federal system.[8] Since the Victoria Charter of 1971 most of the proposals for comprehensive constitutional reform have included procedures for involving the provinces in the process by which members of the Court are chosen. Recent proposals such as those of the Quebec Beige Paper and the British Columbia government further provide for the ratification of appointees to the Court by a house of the provinces or federal council, which would replace the existing Senate and be composed of delegates of the provincial governments.

The almost inevitable politicization of the Court as it assumes a more publicly visible role in interpreting the Charter will mean that those who appoint members of this Court will face more vigorous public scrutiny of their choices and, as in the case of the provinces, other groups may demand some influence on these choices. It is not a question of politicization in the partisan sense. The prevailing practice now is not to appoint members to the Court as a political reward; most of the incumbent judges of the Court were not prominently identified with particular political parties prior to their appointments, and only one had ever run for elective political office. If the procedures that are being recommended for involving the provinces in the appointment process were carried out it would seem probable that <u>any</u> prior partisan identification, certainly with the party of the federal government, would be a liability because in most cases the appointee would be subject to the agreement of governments with more than one partisan complexion. What <u>is</u> likely to become more important is the candidate's jurisprudential philosophy in respect to the division of legislative powers and to human rights and to the appropriate role of the judiciary in the protection of rights.

Peter Hogg (1979, 725-6) suggests that 'the federal government does not see the winning of constitutional law cases as a major policy objective, does not see the role of the Supreme Court in constitutional cases as being of major importance in determining the balance of power between the centre and the provinces, and does see that packing the court [with those having an overt bias towards federal power] would provoke a storm of protest.'

8 See also the contentious argument by Paul Weiler (1974, chap. 6) that it is neither possible nor desirable for the Court to perform this role.

It may well be that the higher perceived stakes of judicial review of the Constitution in relation to both the federal-provincial division of powers and to the Charter will induce the federal government to give a higher priority than it does now to what it believes to be the jurisprudential philosophy of prospective appointees to the Court. And the same response will be given by the provincial governments and by the attentive public if they believe that the Court is an important instrument in respect to their values and interests.

The ongoing politicization of the Supreme Court of Canada has brought about, and will continue to bring about, increasing public attention to the representativeness of the Court. The present Supreme Court Act provides that three of the nine judges shall be from the bench or bar of Quebec and there are well-established conventions for regional representation in respect to the remaining justices. Most of the current schemes for constitutional reform suggest the entrenchment of Quebec representation and some representation of the other regions as well.

Some of the more extreme criticisms of the Court verge on the assertion that judges will inevitably favour the order of government that appointed them and this kind of assertion is used to justify provincial involvement in the appointment of members of the Court. The suggestion that a judge is in some sense a delegate of <u>any</u> government is of course foreign to the essential elements of our judicial tradition, but W.R. Lederman (1970, 2:307-8) has advanced a cogent argument for the recognition of regional membership in the Court that is compatible with judicial independence and impartiality:

> If we ensure that the judges are drawn from the various regions...we ensure that there is available within the Court collective experience and background knowledge of all parts of Canada. In judicial conferences and other contacts within the Court membership, the judges are able to inform and educate one another on essential facts and background from their respective parts of Canada. This is a vital element of relevant native judicially-noticed knowledge that...was missing in the judges of the Judicial Committee of the Privy Council. Here then is the rationale of regional quotes in the Supreme Court of Canada, and to observe the quotas <u>for this reason</u> does not turn the Court into an arbitral body of special pleaders or a miniature national parliament. (Emphasis in text)

The politicization of the Court as it is projected into the arena of public controversy through its interpretation of the Charter is likely to give rise to pressure for representativeness beyond that of the provinces

or regions. In particular, there will be pressures for the appointment of women to the Court. Women's groups and other groups concerned with human rights have been critical of some of the decisions involving the rights of women, particularly the Lavell and Bedard decisions. The minister of justice has recently emphasized the desire of the government to make more female appointments to the federally-appointed judiciary, including the Supreme Court of Canada. In my view, this would give no complete assurance that the judiciary would deal more sympathetically with women's rights even in the relatively small proportion of the cases before them involving such rights - as in the case of males, the jurisprudential philosophy of a women judge is likely to be a more decisive determinant of her judicial conduct than is her sex. If it were deemed essential to change this philosophy without infringing on the independence and impartiality of the Court, I would suggest a constitutional amendment replacing the present rule of retirement at 75 with a provision whereby the median age of the Court should not exceed 60 and when it did the oldest judge should be required to retire to restore this median. At the end of 1977 the median age of the Court was just under 67 years and all but one of the justices had completed his formal legal training in the 1930s. My own disposition is to believe that the Supreme Court of Canada will not adapt an activist and aggressive stance towards the Charter until those judges whose formative jurisprudential attitudes were shaped in the older traditions of Anglo-Canadian law are retired.

The question still remains of the impact of the more contentious role into which the courts will be projected in interpreting the Charter on the legitimacy of the judiciary in the Canadian system of government. Again to quote Peter Russell (1975, 79), the legitimacy that Canadians have accorded to their courts, most crucially the Supreme Court of Canada, has been based on an innocence about judicial power and 'a very unrealistic image of the judicial role'. However:

> In a democratic age, recognized authority to make laws and initiate policy is not readily conferred on an appointed judiciary. As I have suggested elsewhere, the position of our judges is analogous to that of the monarchy facing the advance of parliamentary democracy: they could best retain popular respect by denying that they exercised real power. But unlike monarchy, myth and reality in the judges' case have remained too far apart. It is unlikely that as the public become more sophisticated about the realities of the judicial process, judicial power can hide behind the mask of an ideology which denies the very existence of that power.

As courts come increasingly into conflict with some of the most powerful interests and values of the Canadian community on what reservoirs of popular legitimacy will the judiciary draw? When governments themselves are challenged by interpretations of the Charter we can expect politicians to be quick to point out that they are elected and judges are not; Russell (1975, 79) is again perceptive in pointing out that 'In the United States, with a constitutional doctrine emphasizing checks and balances rather than parliamentary supremacy, judicial realism has been more compatible [than in Canada] with popular political culture.' The Anglo-Canadian political tradition in short is pervaded by the operative assumption that in the final analysis those who are elected have the right to get their way against those who are not. Further, there is a profound communication gap between the Supreme Court and the Canadian public. Like other judges, the members of the Court address their decisions and their rationales for them to the bar and the bench and not to lay persons. Up until now at least, the reporting of the Court by the media has been superficial and sporadic. Canadian legal scholars have for the most part confined their study of the courts to an examination of published judicial decisions and the judiciary has not been studied by the methods of empirical observation of its activities that political scientists apply to cabinets, legislatures, political parties, and public bureaucracies. Unlike his predecessors, the incumbent chief justice has given several public addresses and interviews on the Supreme Court defending its impartiality and integrity and conveying information about its operating procedures. Despite these and other recent efforts to enhance public understanding of the Court, that institution has a severe difficulty in establishing its legitimacy as a political actor, a difficulty of converting judicial power into judicial authority.

The Charter and the Canadian political culture

Political culture is usually defined as the cognitive, evaluative, and affective orientations of persons to their political system.[9] As we saw in Chapter 2, since 1968 the federal government's advocacy of an entrenched

9 There is a vast literature on political culture. For the Canadian setting see Pammett and Whittington 1976, 1-33.

Charter of Rights has been part of a constitutional strategy whose objectives are broader than the more effective protection of rights and are aimed in a fairly explicit way at changing the attitudes and allegiances of Canadians towards the political community of which they are citizens. The 1981 Charter's place in the future political culture of Canada can be analyzed in two related dimensions - the Charter as part of a Constitution that is a compelling national creed or symbol and the Charter as a device for strengthening national as against provincial allegiances.

In documents that were placed by the federal government before the constitutional conferences of 1968 and 1969 (Pearson 1968; Trudeau 1968; Trudeau 1969) there was introduced into the constitutional debate the idea, very new in Canadian discussion, that the Constitution should be a coherent and eloquent statement of the nature and ideals of the Canadian community. The Constitution and the People of Canada, published over Prime Minister Trudeau's signature, stated this:

> The first element in Canada's Constitution, in the view of the Government of Canada, should be a statement - a preamble - on the objectives of the federation. The basic role of the Constitution is, of course, to define the system of law and government which shall prevail in Canada. But before doing this, the Constitution must express the purpose of Canadians in having become and resolving to remain associated together in a single country, and it must express so far as this is possible in a Constitution what kind of country Canadians want, what values they cherish and what objectives they seek. (Trudeau 1969, 4-6)

The general prescription has continued to be on the constitutional agenda, and one of the twelve items in the discussions leading up to the First Ministers' Conference of September 1980 was the preamble to a new Constitution. Accompanying such proposals has been an ongoing criticism of the existing Constitution as an inadequate statement of what Canadians as a people are and aspire to be. For example, the Report of the Special Committee of the Senate and House of Commons on the Constitution of Canada stated, 'The measure of the inadequacy of the British North America Act is that it does not serve Canadians fully as an inspirational ideal' (Canada 1972, 6). In similar spirit, the authors of the Report of the Canadian Bar Association Committee on the Constitution (1978, 2) wrote, 'The existing Constitution is woefully weak in any symbolism that helps to tie a people together by identifying what their country means to them and what they can expect of its institutions.'

When the new Canadian Constitution is regarded as a creed or symbol the Charter of Human Rights is of course a central element of this statement of national purpose. In Federalism for the Future, which was introduced into the Constitutional Conference of 1968, Prime Minister Pearson (1968, 8) said:

> We have...suggested to the governments of the provinces that first priority should be given to that part of the Constitution which should deal with the rights of the individual, both his rights as a citizen of a democratic federal state and his rights as a member of the linguistic community in which he has chosen to live. In agreeing to place this item first on our agenda the federal and provincial governments have in no way overlooked the critical importance of determining which of the functions of government should be assigned to the two orders of government in Canada. Rather we have developed our belief that the rights of people must precede the rights of governments. Accordingly, our discussions will begin with a consideration of 'The Rights of Canadians', under which heading we will discuss a proposed Charter of Human Rights and the recommendations of the Royal Commission on Bilingualism and Biculturalism concerning linguistic rights.

Since 1968 successive Liberal governments in Ottawa have never been deflected from their conviction of the substantive and symbolic primacy of a charter of rights in a new Canadian constitutional settlement, as witnessed recently by the contents of the constitutional resolution introduced into Parliament in October 1980.

What of the Charter as a compelling national creed or symbol? Understandably and justifiably, its language is that of the legislative draftsman rather than the poet or orator and its primary audience is the bar and the bench and not the wider Canadian citizenry. Certainly if any provincial or local authority required school children to recite all or part of the Charter as part of their daily patriotic exercise, one would hope that the courts would strike down such an action as 'cruel and unusual treatment or punishment' under Article 12 of the Charter itself.

Yet this does not dispose of the matter. We know very little about how compelling national symbols are developed and embedded in the public consciousness. Apart perhaps from the short preamble, the language of the Constitution of the United States is terse, lucid, and explicit. Yet from early on in the history of the republic the Constitution has been a powerful, though at times divisive, symbol. Max Lerner in his monumental America as a Civilization (1957, 442) described the 'imagery of belief' about the Constitution in these terms:

...this unvarying symbol has had a changing content. The Constitution started as a compact - whether of the states or of the people is still disputed. Later the Civil War burned it into the consciousness of Americans as a symbol of indestructible union. Later still, when the Supreme Court interpreted some of the constitutional doctrines in a way to invalidate legislation, the Constitution became in the popular mind mainly a set of limitations on the power of government. Only after the Supreme Court crises under the New Deal did it clearly emerge as an instrument of government... Recently, under the tensions that have beset civil liberties everywhere, the Constitution has come to be stressed as a code of freedom: a set of guarantees of human freedom and a symbol of vigilance against the arbitrary use of men's power over man. (Emphasis in text.)

In Lerner's view then, the way that the U.S. Constitution has been regarded by successive generations of Americans has been decisively determined by crucial events in the nation's history and circumstances. So far as Canada's present constitutional resolution is concerned, one can be only very conjectural about its place in the future political consciousness of Canadians. It is likely that this will be determined above all by how Canadians come to perceive the circumstances of 1980-1 under which the new constitutional regime was established and how favourably they view the activities of the judiciary in interpreting the Charter.

It is emphasizing the obvious to say that 1980-1 has been a period of intense and bitter constitutional conflict in Canada and that the resolution is being enacted against the vigorous opposition of large numbers of powerful interests in the country, including eight provincial governments. In their defence of the resolution, members of the federal government have taken the position that once its changes become part of the Constitution the clamour will die down and in a relatively few years Canadians will be puzzled about what the present conflict was all about. There are few rational grounds for such complacency. So far as I know, there is no body of analysis that helps us to predict even tentatively whether and under what circumstances losers in a bitter political conflict will be disposed to accept the legitimacy of the results. For example, the generation of Germans after the First World War regarded their defeat very differently than did their sons and daughters the defeat of 1945, demonstrably the Catholics of North Ireland have never accepted the partition effected in 1922, students of American history are divided on when and to what degree Southerners accepted the verdict of 1861-5. One can imagine John A. Macdonald and his colleagues comforting themselves in 1885 by

believing that although the decision to hang Riel had led to bitterness and division, it would all go away in a year or two. On the other side, some of us outside Quebec have been puzzled by the degree to which the indépendantistes of that province have accepted the legitimacy of the popular verdict rendered in the referendum of May 1980. In brief, there is no way to know how the circumstances of the birth of the Charter will be viewed by Canadians in the future. And as I have argued earlier in this chapter, one can only speculate about how the courts will interpret the Charter and how their activities in this regard will be perceived by their fellow citizens. To put it another way, there is no body of knowledge, so far as I know, that gives much direction to those who want to create compelling national symbols.

As we have seen, successive federal governments since 1968 have insisted that in any new constitutional settlement a charter of rights must take precedence over the division of legislative powers between Parliament and the provinces. In a perceptive article, Alan Cairns (1979, 354) has pointed out the importance in the recent thinking of the federal authorities of a 'transcendent loyalty' to Canada. Cairns goes on to write of Ottawa's constitutional strategy as embodied in Bill C-60 introduced into Parliament in 1979:

> A basic vehicle for attaining that transcendent loyalty [to Canada] was the proposed Charter of Rights and Freedoms. The proposal for an entrenched Charter binding on both levels of government, and as comprehensive as possible, was an attempt to move in an American direction and thereby confirm the preeminence of citizens over institutions...and ensure that rights and freedoms are inalienable...At a more profound political level it was an attempt to enhance and extend the meaning of being Canadian and thus to strengthen for support. The Charter would establish 'new rights for Canadian citizens to live and work wherever they wish in Canada.'
>
> So central was the Charter to the federal strategy that one of the two federal conditions for constitutional renewal was its inclusion in the Constitution, and its application to both levels of government. The resultant rights and freedoms were to be country-wide in scope, enforced by a national supreme court, and entrenched in a national Constitution beyond the reach of fleeting legislative majorities at either level of government. The consequence, and one very clear purpose, was to set limits to the diversities of treatment by provincial governments, and thus to strengthen Canadian as against provincial identities. Rights 'must not be dependent on the particular place where an individual chooses to reside.'

There is ample evidence to demonstrate the ongoing strengthening of provincial as against national allegiances, and in their recent book, Small

Worlds: Provinces and Parties in Canadian Political Life, David Elkins and Richard Simeon (1980, 101) summarize the trend in terms of 'the increasingly strong [citizen] attachments to provincial governments, and a declining integration of national and provincial voting and party systems'. But what are the capacities of the Charter to resist such provincializing currents in the Canadian political culture? Will the Charter help us to resolve the crisis of national identity and of what it means to be a Canadian by allowing each of us to say in a spontaneous and deeply felt way, 'Yes, I am a Canadian. And what this means above all is that I have rights and they are written clearly in the Canadian Charter of Rights and Freedoms of 1981 and nobody but nobody can take them away from me.'? As the tone and substance of the foregoing paper will indicate, my expectations of the Charter in this dimension as in others are somewhat modest.

APPENDIX

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

This appendix contains the Charter as part of the Constitution Act, 1981, tabled in the House of Commons by the minister of justice. This is the version of the Charter that emerged from the Proceedings of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada.

SCHEDULE B

CONSTITUTION ACT, 1981

Part I

Canadian Charter of Rights and Freedoms

Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

   (a) freedom of conscience and religion;
   (b) freedom of thought, belief, opinion and expression, including the freedom of the press and other media of communication;
   (c) freedom of peaceful assembly; and
   (d) freedom of association.

Democratic Rights

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to

be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.
(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and
(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;
(b) to be tried within a reasonable time;
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
(e) not to be denied reasonable bail without just cause;
(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not be be tried or punished for it again; and
(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subject to any cruel and unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process from, any court of New Brunswick.

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada and to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province and to all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this Act, except Part VI, comes into force.

Citation

33. This Part may be cited as the Canadian Charter of Rights and Freedoms.

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